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BEFORE THE
Supreme Court of the United States

October Term, 1944

No. 62

SPECTOR MOTOR SERVICE, INC.,
Appellant,

v.

CHARLES M. McLAUGHLIN, TAX COMMISSIONER,
WALTER W. WALSH, SUBSTITUTED DEFENDANT,
Appellees.

**BRIEF OF SPECTOR MOTOR SERVICE, INC.;
APPELLANT**

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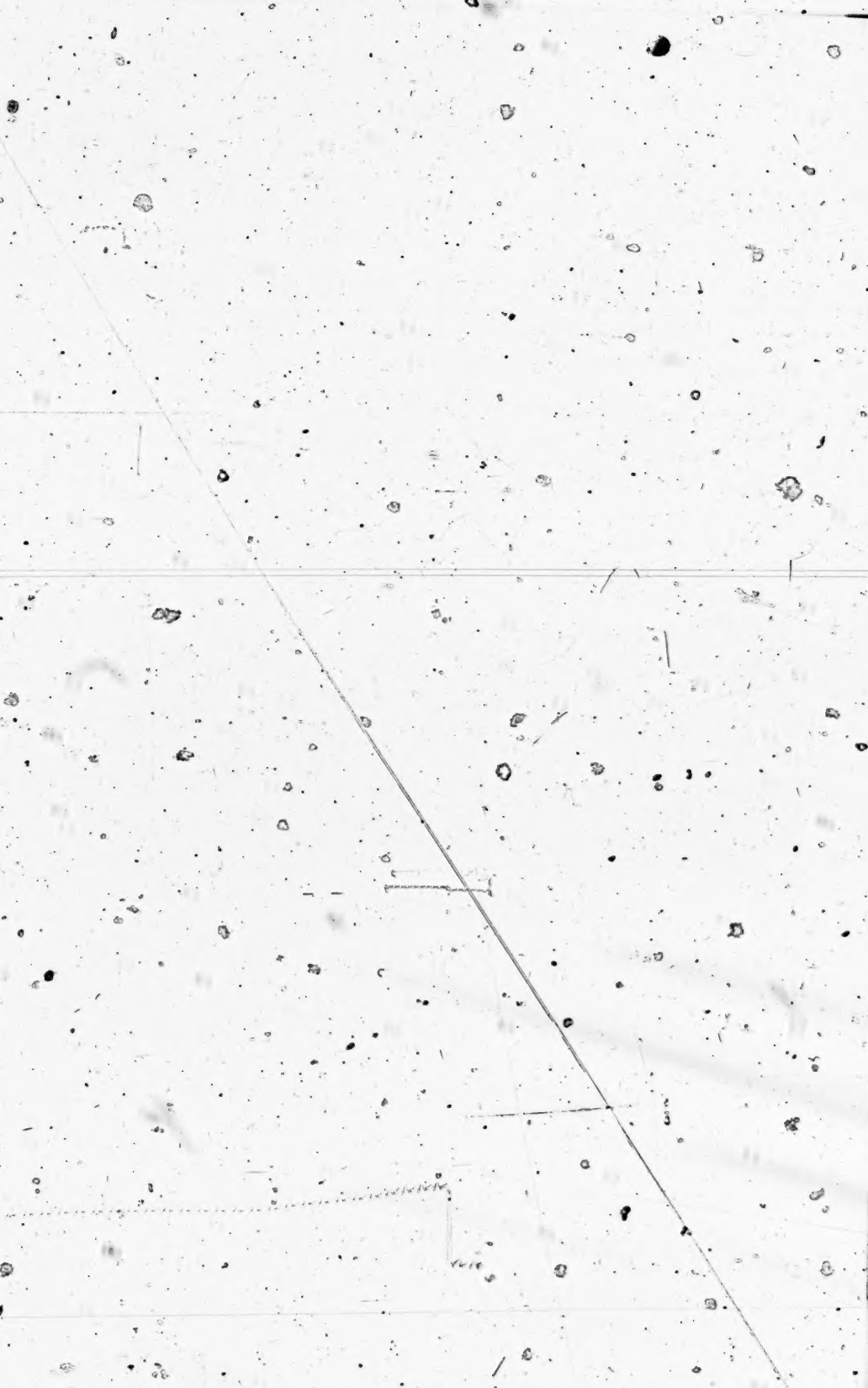
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CHARLES M. McLAUGHLIN, TAX COMMISSIONER,
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Appellees.

**BRIEF OF SPECTOR MOTOR SERVICE, INC.,
APPELLANT**

Opinion of the Lower Court.

The opinion of the United States Circuit Court of Appeals (Second Circuit) was filed December 24, 1943 (decree January 20, 1944) and is found on page 109 of the transcript of record. The dissenting opinion appears at page 132 of the transcript of record. The case in the Circuit Court is reported in 139 Fed. (2d) 809 and in the District Court it is reported in 47 Fed. Supp. 671.

Jurisdictional Statement.

The statement as to jurisdiction required by Rules 12 and 27 (e) of this Court, was filed in connection with petition for certiorari, which petition was allowed May 22, 1944.

Statement of Case.

This action arose from a suit to enjoin the assessment of an excise tax by the defendant's State Tax Commissioner upon the plaintiff.

This case is an appeal by plaintiff, from the final decree of the United States Circuit Court of Appeals (Second Circuit), which decree reversed the District Court of the United States for the District of Connecticut, which decree was in favor of plaintiff.

The decision of the Circuit Court of Appeals upheld the validity of a tax statute of the State of Connecticut, which statute had been held invalid by the District Court.

The statute in question, as applied, levied an excise tax on the defined income of plaintiff, a foreign corporation, engaged as a common carrier by motor vehicle, exclusively in interstate commerce, in Connecticut and in eleven other states. The issues involve (a) taxable subject, (b) taxation of extraterritorial income, and (c) disallowance of expenses under "defined income".

Statutes Involved.

The statute involved is the Connecticut Corporation Business Tax Act of 1935 as amended, and particularly Section 418.c Cum. Supp. to General Statutes, and Section 176 f, effective July 1, 1937, which provisions, among others, are set forth in the appendix hereto.

In brief, the Connecticut Act provides that *every corporation* (with exceptions not here material) "*carrying on business in this State*" shall pay annually "*a tax or excise upon its franchise for the privilege of carrying on or doing business within the State*" of 2% of the defined income received "*from business transacted within the State during the income year*". In 1937, the Act was amended and made applicable, not only to corporations carrying on business in

Connecticut, but also, to those "*having the right to carry on business in this State*".

On corporations whose trade or business is carried on "partly without the State" the Act provides that the tax shall be imposed on the business "*which reasonably represents the proportion of the trade or business carried on within the State*". The statute purports to levy a tax on "net income", as defined, however, certain major expenses are not deductible, and for that reason, and to that extent, plaintiff contends that the tax has the effect of being a tax on "gross income".

When income is derived from the manufacture, sale or use of *tangible personal* or real property, the portion to be attributed to "*business within the State*" is determined by an allocation factor which is the simple arithmetical mean of three fractions:

- (1) Average monthly fair cash value of taxpayer's *tangible property in Connecticut.*

Total average monthly fair cash value of all taxpayer's tangible property.

- (2) Wages paid to employees from Connecticut offices
Total wages paid to employees of taxpayer.

- (3) Gross receipts from transactions chiefly negotiated and executed in Connecticut.

Taxpayer's total gross receipts (excluding income from interest and dividends or capital gains).

As applied by the State Tax Commissioner, the tax is assessed against common carriers by motor vehicle which are exclusively engaged in interstate commerce, including foreign corporations and including foreign corporations having their business domicile outside of the state. As applied by the State Tax Commissioner, *interstate commerce* is deemed "*business carried on within the State*". The determination of that portion of the interstate commerce which is deemed "*business carried on within the*

state", is determined by taking all of the *gross revenue* from all interstate shipments outbound from Connecticut and the elimination of all of the gross revenues on all interstate shipments inbound to Connecticut.

Summary of Complaint.

The suit was commenced by complaint filed March 9, 1942 (T. 3). The complaint alleged that plaintiff's business in Connecticut was entirely interstate in character (Paragraph 9, T. 4) and that plaintiff is not authorized or qualified to carry on an intrastate business in Connecticut (Paragraph 10, T. 4).

Plaintiff alleged that the assessments and penalties were void as a burden and direct tax upon interstate commerce in violation of Article I, Section 8, and as applied, is in conflict with Article XIV, Section 1, of the amendments to the Constitution of the United States (Paragraph 16, T. 5).

The complaint, paragraph 16, alleged that the tax, as applied, was unconstitutional under the Constitution of Connecticut and that the statute did not authorize the application of the tax to plaintiff.

Upon recital of the amounts demanded, plaintiff prayed for an injunction restraining the collection of said assessments and penalties.

Rulings Below.

Upon a hearing on the issues by the District Court of the United States, Judge Joseph Smith held the tax to be unconstitutional, in the light of the decisions of this Court. In reversing the District Court, the Circuit Court of Appeals conceded that the tax, as applied, was unconstitutional, in the light of the decisions of this Court, but concluded that the trend of decisions by this Court were such that this Court would now uphold such a tax (T. 109).

Legislative History of Statute.

The statute in issue was based upon a report made by the Connecticut Temporary Tax Commission.¹

Judicial History of Statute.

As applied to foreign corporations engaged as common carriers exclusively in interstate commerce, this case appears to be the first and only time that the legality of the statute has been brought in issue. It does not appear that Connecticut has heretofore undertaken to apply the statute to other such carriers.

Issues involving allocation of business, similar to some of those raised herein, were dealt with in *Underwood v. Chamberlain*,^{1a} which case is cited and quoted herein. Issues involving delegation of powers, which issues are also raised herein, have been considered by Connecticut courts.^{1b}

Issues involving application of the statute to service industries, as distinguished from those engaged in manufacturing or selling have been dealt with.^{1c}

Most important, is the fact that the Connecticut law was patterned after a Massachusetts law which was declared invalid by this Court.^{1d}

¹Opinion of Circuit Court, T. 109, 112.

^{1a}*Underwood v. Chamberlain*, 94 Conn. 47, 55.

^{1b}*State v. Stoddard*, 126 Conn. 623, 13 Atl. (2d) 586.
Conn. Baptist Convention v. McCarthy, 128 Conn. 701, 25 Atl. (2d) 656.

^{1c}*Lynch v. Hotel Bond Co.* 117 Conn. 128, 131.
Ace High Dresses, Inc. v. J. C. Trucking Co. Inc., 122 Conn. 578, 581.

^{1d}*Alpha Portland Cement Co. v. Mass.* 268 U. S. 203, 69 ed. 916.

Summary of Evidence.

Appellant's Evidence.

Appellant presented two witnesses. Witness Fisher—direct examination. He is secretary, treasurer and general counsel of the appellant (T. 10). Appellant is a foreign corporation organized under the laws of Missouri and its principal business domicile is in the State of Illinois (T. 11 and 12). He described the history of the appellant (T. 12-14). A terminal was opened in New Britain, Connecticut, about 1934 (T. 15). Appellant qualified as a corporation in Connecticut because the land-lord who owned one of the terminals required it to do so (T. 15). Appellant never applied for authority to do intrastate business in Connecticut and its operating authority is *restricted against intrastate business* (T. 15, 16, Exhibits 3 and 4). It operates in 12 states (Exhibit 5) and holds a certificate from the Interstate Commerce Commission under Part II of the Interstate Commerce Act (T. 17, Exhibit 6). Various exhibits showing appellant's routes in the several states were introduced, which exhibits were numbered 5 and 7-1 to 7-8 (T. 17-20). The terminal at Bridgeport, Connecticut, was opened in 1934 (T. 20). He described the functions of the local terminals (T. 21). He presented a consolidated exhibit showing mileage by states (T. 21, 22, Exhibit 8). Appellant does not engage in intrastate commerce anywhere on its system (T. 12, 23). The total mileage of its routes in Connecticut is 300 miles (T. 20, Exhibit 7-1). The total mileage in all states is 7,977 miles, and the percentage of its mileage in Connecticut was 4.23% (T. 23, Exhibit 8). It maintains two local terminals in Connecticut and listed the employees and equipment maintained at the Connecticut terminals (T. 25-29, Exhibits 9 to 13). Appellant maintains a bank account in Connecticut which is used for deposits only, as all disbursements are made through and from its Chicago office (T. 27). The reason for maintaining a

separate subsidiary corporation, known as the Wallace Transportation Co., which owns the trucks, was based on reciprocity between the states in connection with the licensing of vehicles (T. 29-32). He introduced Exhibit 14, showing the various assessments levied by Connecticut (T. 32). Sixty percent of the cost of leasing equipment was allowed by Connecticut as an operating expense and forty percent was disallowed (T. 32).

Witness Fisher—cross examination. About 150 pieces of equipment are operated and at some time during the year, all of them would come to Connecticut (T. 32). Terminals are leased at New York, Bridgeport, New Britain, Chicago and St. Louis (T. 33). The principal place of business is Chicago and the largest terminal is at Chicago (T. 33). St. Louis is the legal domicile and a terminal is maintained there (T. 33). Other terminals are maintained at other places (T. 33). The terminal at New Britain is about 100 feet long, 50 feet wide and two stories high, and is used for dock space, and no storage business is done there (T. 33, 34). The Bridgeport terminal is about one-third of the size of the New Britain terminal (T. 34). The Bridgeport terminal is on a month to month rental agreement (T. 34). The New Britain terminal is leased for three or five years (T. 34). The rental at New Britain is \$300 or \$350 per month and at Bridgeport the rental is \$325 a month. The duties of the terminal manager at New Britain were described (T. 36-38). Some shipments are picked up from the plants by local cartage operators but large shipments are picked up by the over-the-road or line haul trucks (T. 38, 39). The New Britain payroll amounts to about \$1200 a week and it is paid by draft on the Chicago office, and payments on account of the Bridgeport terminal are handled the same way (T. 41, 42). Taxes on personal property are paid to the City of New Britain (T. 42). A bank account is kept at Bridgeport but the primary bank account is kept at Chicago; other accounts are kept at

St. Louis and New York (T. 42). The local bank accounts are merely transfer accounts (T. 42). All payments clear through the Halsted Exchange National Bank at Chicago (T. 43). The company maintains a centralized supply department and the local terminals have no authority to buy supplies (T. 43). Only incidental or petty cash matters are handled and paid at the local offices (T. 43, 44). Prepaid shipments out of Connecticut are handled through the Connecticut offices and "collect" shipments are handled at destination or through the Chicago office (T. 44, 45). About 50% of the shipments are prepaid (T. 45). Being common carriers they have no contracts with shippers (T. 45) and they have no discretion as to the freight which will be handled (T. 45, 46). Pick-up and delivery service in Connecticut is part of the line-haul movement (T. 46, 47). Pick-up and delivery service is paid for on the per 100 pounds basis (T. 47). They pay various state taxes in Missouri and Illinois. Special taxes are paid in New York, Maryland and New Jersey (T. 48). Income and personal property taxes are paid in Missouri. Through the subsidiary, the Wallace Company, personal property taxes are paid on equipment (T. 48). Personal property taxes are paid in Indiana (T. 49). Some taxes are paid in New York (T. 49). Unemployment taxes are paid in all states in which terminals are located and these taxes amount to about \$2500 a month, of which about \$1000 per year is paid in Connecticut (T. 50). A franchise tax is paid in Illinois and Missouri. A franchise tax (other than the tax here involved) is paid in Connecticut (T. 50, 51).

Redirect examination. Gasoline is purchased in Connecticut but the tax is paid by the subsidiary, the Wallace Company (T. 51).

Witness Fisher recalled. Exhibit 16 shows the expenses paid by the Wallace Company and they included shop salaries and maintenance, and the drivers for about 5 local cartage drivers used in Chicago (T. 68, 69). All of the

trucks owned by the subsidiary, the Wallace Transportation Company, are used by appellant (T. 68). The officers of appellant do not draw salaries as officers in the Wallace Company (T. 69). Appellant's rates are based on door-to-door delivery, and local cartage operations are included in the line-haul rates (T. 69).

Witness Arnold—direct examination. He is an accountant. Figures were shown for seven months of 1938, because, in that year, they changed from a fiscal to a calendar year (T. 54). Based on the method of taxation, as applied by Connecticut, the witness showed the result of the tax, if applied by other states (T. 55, 56, Exhibit 15). The expenses of the Wallace Transport Company (the subsidiary) were shown to have all been in the nature of actual and direct operating expenses, all of which were indirectly borne by the appellant (T. 57, 58).

Cross examination. In 1940, 34% of all shipments originated in Connecticut and in 1939, 42% (T. 60). Under Interstate Commerce Commission's accounting rules, "purchased transportation" is a deductible expense (T. 61). The Connecticut tax is, in effect, a tax on gross income because certain expenses are not allowed (T. 62). In connection with the trucks secured from the Wallace Company, appellant pays the drivers (T. 62). Apart from trucks secured through the Wallace Company, appellant employs from 40 to 50 owner-drivers (T. 63).

Redirect examination. Administrative Ruling No. 4 of the Interstate Commerce Commission requires appellant to employ and pay the drivers and the union contract likewise, makes them employees of the appellant (T. 64).

Recross examination. Corporation taxes are paid in Missouri and Illinois and a franchise tax in Connecticut (T. 65).

An occupancy tax is paid in New York City (T. 65). A franchise tax is paid in Illinois (T. 66). A corporation tax of \$75 is paid in Missouri (T. 66).

Re-redirect examination. Unemployment taxes are paid in Massachusetts, Connecticut, New York, Illinois, Missouri and Rhode Island and these taxes amount to between \$2,000 and \$2,500 per month (T. 66, 67).

Appellees' Evidence.

Appellees' evidence consisted of the testimony of three witnesses.

Mr. DiCicco was Tax Examiner for the State and made field audits. He inspected the books of the appellant and made the determinations of the amounts of appellant's gross business, which he found to have been "attributable to Connecticut" (T. 70, 72). Of the business which was determined to have originated in Connecticut, substantially 50% of the freight charges were collected outside of Connecticut (T. 72, 73). In allocating business to Connecticut, *he did not take into consideration the mileage which appellant operated in Connecticut* (T. 73). His authority for the use of the allocation fraction applied is Section 356 e of the 1939 Supplement to the General Statute (T. 74). He concluded that appellant was engaged in a business involving the "manufacture, sale, or use of tangible, personal or real property" (T. 75). If appellant was not engaged in such a business the allocation would be independently determined by the Tax Commissioner (T. 75).

Witness Steege was Corporation Director in the Corporation Division of the State Tax Department (T. 76). He allowed 60% of appellant's "purchased transportation" expenses as a business expense and disallowed 40% as "rent" (T. 76). He stated that no other state disallowed rental payments and for that reason, it was necessary for his Department to establish some definite application of

the term "rent" (T. 76). He made a study of the use of trucks by a large chain store company, and arrived at the 40-60 ratio (T. 76, 77). The carriers studied by him, hauled for the A & P Tea Company and are contract carriers, however he would not agree that they were relatively short-haul carriers (T. 77, 78). The portion of the statute which prohibits deductions of "rent" is Section 419 c, 1935 Cum. Supp. (T. 78). There is nothing in that section fixing the percentage and the percentage was based on a ruling of the department (T. 78, 79). In making the 40-60 allocation, he undertook to distinguish between the use of a piece of equipment and other normal expenses incurred in operation of equipment (T. 79). The 40-60 ratio was adopted in 1936, and an opinion was secured from the Attorney General in 1939 (T. 79, 80, Exhibit 19).

Witness Rau is office manager of the New Britain Rationing Board, a Division of the Office of Price Administration (T. 87). He introduced appellees' Exhibits A and B, which exhibits referred to appellant's application for tires, and the object of the exhibits was to show that appellant did business in Connecticut (T. 87-94).

EXHIBITS.

Appellant's Exhibits	Identified	In Evidence
1	T. 9	T. 9
2	T. 9	T. 9
3	T. 10	T. 10
4	T. 10	T. 10
5	T. 16	T. 16
6	T. 17	T. 17
7-1 to 7-8	T. 19	T. 19
8	T. 22	T. 22
9	T. 24	T. 24
10	T. 25	T. 25
11	T. 25	T. 25
12	T. 29	T. 29
13	T. 29	T. 29
14	T. 32	T. 32
15	T. 54	T. 54
16	T. 57	T. 57
17	T. 73	T. 73
18	T. 73	T. 73
19	T. 80	T. 80
Appellees' Exhibits		
A	T. 93	T. 93, 94
B	T. 93	T. 93, 94

Specifications of Errors.

1. The Circuit Court of Appeals erred in disregarding the controlling decisions of this Court.

2. The Circuit Court of Appeals erred in holding that the income of appellant is, under the facts of the case, a taxable subject, under the Commerce Clause, Article 1, Section 8 of the Constitution of the United States.

3. The Circuit Court of Appeals erred in failing to hold the tax, as applied to extraterritorial income, invalid under both the Commerce Clause and the 14th Amendment.

4. The Circuit Court of Appeals erred in failing to hold the tax, as applied to defined income, inequitable and invalid under both the Commerce Clause and the 14th Amendment, to the Constitution of the United States.

5. The Circuit Court of Appeals erred in failing to hold that the statute was not applicable to appellants.

6. The Circuit Court of Appeals erred in failing to hold that the statute was invalid under the Constitution of the State of Connecticut, by reason of unconstitutional delegation of powers.

Summary of Argument.

Introductory.

Determination of "defined income" and tax under the formula adopted by the Tax Commissioner, exemplified.

The case does not involve any element of failure of interstate commerce to bear a reasonable share of the general tax burden.

The distinction between transportation and manufacturing is an important factor in considering the practical effect of tax statutes.

Appellant's business is typical of the motor carrier industry.

The motor carrier industry bears its fair share of taxation.

Congress has repeatedly shown its concern for a sound national transportation system by implementing the Commerce Clause.

Congress has acted in the light of controlling decisions of this Court on tax matters involving transportation, and those decisions are in effect, part of the Interstate Commerce Act.

Point 1

The State of Connecticut has imposed a tax which, as applied in this case, is aimed directly at interstate commerce, and thereby contravenes the Commerce Clause.

Point 2

The Act, as applied, subjects interstate commerce to multiple or cumulative taxes which impose a destructive burden on interstate commerce in contravention of the Commerce Clause.

Point 3

The State has discriminated against interstate commerce in contravention of the Commerce Clause and applied its statute so arbitrarily and capriciously as to deny plaintiff equal protection and due process of law.

Point 4

The State law is not applicable to plaintiff, but if so, as administered, it contravenes the Constitution of Connecticut.

Point 5

As construed by the defendant the statute violates the due process requirements of both Federal and State constitutions.

Point 6

The assessments are void, because, as made by the defendant, an officer of the Executive Department of the State Government acted in a legislative capacity.

Point 7

Penalties and interest should not be allowed, in cases involving good faith litigation.

ARGUMENT.

Introductory.

Plaintiff is a Missouri corporation, having its principal place of business in Illinois, and it is exclusively engaged as a motor carrier of property, and operates exclusively in the transportation of interstate commerce. It operates exclusively by virtue of a certificate of convenience and necessity issued by the Interstate Commerce Commission pursuant to Part II of the Interstate Commerce Act. It is not engaged in intrastate commerce in any state. It operates in interstate commerce to and from the states of Missouri, Illinois, Indiana, Pennsylvania, New Jersey, Massachusetts, New York, Rhode Island, Maryland, District of Columbia and Connecticut, and across the state of Ohio.

The Tax Formula.

Defendant purported to act under the provisions of the Connecticut Business Tax Act of 1935, as amended, the pertinent provisions of which are set forth in the appendix. The taxes immediately in issue involve the years 1936 to 1940, inclusive, and amount to \$7,795.50.¹⁶

As applied to the business of plaintiff, the formula used by the Tax Commissioner, produced the following fractions by which was determined the portion of plaintiff's business which was "*business within the State*" for the year 1940:

1. Tangible Property	.071479% of total
2. Salaries and Wages	.059896% of total
3. Receipts from transportation	.341149% of total
	<hr/>
	.472524

Dividing the sum of the three fractions (.472524) by the number of fractions (3) gives a factor of .157508 used to determine the portion of plaintiff's business found to be

¹⁶Opinion, District Court, T. 95 and Exhibit 18.

"business within the State" for 1940. The factor varied from .157508 to .461293, according to years, as shown by Ex. 17.

For 1940, plaintiff's gross receipts were \$1,723,510.65, of which, Connecticut says, \$587,973.59 arose in that State. Plaintiff's net income, as determined by Connecticut (certain expenses disallowed) was \$426,291.01, and the application of the factor .157508, to the net, as determined, produced an amount of \$67,304.24 as representing the "net profits arising in Connecticut, and to which was applied the tax of 2%, producing a tax liability, for that year, of \$1,346.08.²

The results produced under the Connecticut formula (certain expenses disallowed) for determining "net income", compares with net income, determined in accordance with the accounting requirements prescribed by the Interstate Commerce Commission, and as allowed in connection with Federal income taxes, as follows:

Year	Gross Receipts	Connecticut	Interstate
		Formula	Commerce
		Net Income	Commission's
			Formula
			Net Income
1940	\$1,723,510.65	\$426,291.01	\$10,505.86
1939	1,202,210.35	344,381.54	\$6,064.34
1938	432,087.39 (7 mos.)	101,375.19	111.39
	<hr/>	<hr/>	<hr/>
	\$3,357,808.39 ³	\$872,047.74 ⁴	\$56,687.59 ⁵

²Opinion of C. C. A.—Note 4—T. 113 and Ex. 17.

³Witness DeCicco, T. 71, 72, Ex. 15, 17 and 18, T.—

⁴Witness Arnold, T. 55, 56, Ex. 15, 17 and 18, T.—

⁵Witness Arnold, T. 55, 56, Ex. 15, 17 and 18, T.—

It will be observed that under true accounting, as prescribed by the Interstate Commerce Commission, the total earnings of plaintiff for the two years and 7 months, above shown, was \$56,621.15, or 1.7% of net profit on its gross business, whereas under the Connecticut basis for determining "net income" plaintiff is stated to have earned \$872,047.75, or 25.9% on its gross business.

The difference in "net income", as determined by the formula applied by Connecticut, and actual net income, produced by the accounting methods prescribed by the Interstate Commerce Commission, will represent, in part, the basis for argument with respect to burdens on interstate commerce under the commerce clause and denial of due process under the 14th Amendment.

As determined by Connecticut, the volume of business allocated to Connecticut is based on the gross revenue from all interstate shipments originating in Connecticut or billed by plaintiff from Connecticut points, and such revenue is not allocated by Connecticut on the basis of either gross or net earned in Connecticut on a mileage or any other basis.

Plaintiff contends that the tax, as applied, is multiple and cumulative and would necessarily result in it, and all other carriers similarly situated, operating at an out-of-pocket loss, if such a tax were to be imposed by other states through which operations are conducted.

The General Tax Burden.

It has been said that there is a line of decisions by this Court which lays down the dogmatic rule that a state may not tax interstate commerce. Then it is said that the effect of the rule is such, that interstate commerce may escape its share of the burden of maintaining state governments.

⁶Witness De Cicco, T. 73.

We have considered the cases involved and asserted implications, but, as we understand them, have found no case which necessarily results in interstate commerce escaping a reasonable share of the tax burden, and, therefore, we do not here assert any claim for exception based on the alleged dogmatic rule.

We know of no interstate commerce or subject of commerce which may not meet the full force of state taxation, both prior and subsequent to its status as interstate commerce. We know of no commerce which has or can escape the burdens of property taxation on the facilities which are employed in the transportation of interstate commerce, or vehicle licenses, excise taxes on gas, oil, tires and parts, and taxes for the use of the highways.

We approach the issues here presented with the assumption that, under the prevailing concept of interstate commerce and matters which affect interstate commerce, the sweep may be so broad and the impact on the economy of the states so great as to foreclose an argument on behalf of dogmatic exemption from taxation. We can't lift the alleged precedents for exemption from their factual setting and impute to those cases results which we think are foreign to the facts and intent.⁸

Every case which we have examined seems to have an individual factual setting. The decisions of this Court, as we understand them, go to the proposition of condemning multiple, cumulative and discriminatory taxes, as distinguished from exemptions from taxation.

⁸"It is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. 'Even interstate commerce must pay its way'. *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 259, 39 S. Ct. 265, 63 L. Ed. 590". *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 254, 58 S. Ct. 346, 82 L. Ed. 823.

Tax cases, as a whole, have been too numerous and too varied to be helpful in dealing with a particular problem such as we have here. We shall try, with care, not to disregard any class of tax cases, nor any trend in tax philosophy, if such exists.

Taxation of Transportation.

We respectfully submit, at the outset, that there are fundamental distinctions between the manufacture or mining and distribution of goods, or the merchandising of goods, on the one hand, and the transportation, or the furnishing of service of transportation, in interstate commerce, on the other hand, and that these differences call for different considerations in connection with tax policies. While both may be interstate commerce, the tax incidence is so different, that a rule under which one class might be taxed and prosper, without directly and unduly burdening interstate commerce, if applied to transportation, would not only unduly burden interstate commerce, but would annihilate common carrier service of transportation for interstate commerce.

There is here presented for review, a type of tax law which does not stop with presenting an issue as to whether it unduly burdens interstate commerce, but goes to the issue as to whether *it has the capacity to annihilate the service of common carriers engaged in the transportation of interstate commerce.*

The record, in general, is fairly comprehensive as to factual material, however, for the sole purpose of illustrations, and consistent with the premises laid by the record, it seems desirable to refer to additional transportation material not of record in this case. The material referred to, will be reports prepared by the Interstate Commerce Commission and contained in published statements.

Appellant's Business is Typical.

There may arise the question as to whether plaintiff's business is normal or representative of the motor carrier industry. This question is answered by the reports compiled by the Interstate Commerce Commission, which show plaintiff's net profit experience as compared with the industry.⁹ These statistics indicate that the industry could no more stand the Connecticut tax burden than appellants can.

The Industry is Fully Taxed.

Some portions of the opinion of the Circuit Court of Appeals observed that railroads and motor carriers are competitive. From what the Court said, it might be inferred that it entertained to some extent, a feeling of necessity for a tax policy which would equalize the fortunes of those competitive industries. We meet that issue, and turn to the reports of the Interstate Commerce Commission for information bearing on the respective portions of the gross and net income of both railroad and motor carriers which are expended for taxes. These reports show that the motor carrier industry is more than fully taxed.¹⁰

⁹Figures taken from Interstate Commerce Commission reports on "Statistics of Class 1 Motor Carriers of Property Engaged Preponderantly in Intercity Service."

National Statistics

Year.	Operating Income	Operating Expenses	Net Operating Revenues	% Net to Gross
1942	\$587,869,636	\$556,472,133	\$31,397,503	5.5%
1941	560,166,612	533,232,281	26,934,331	4.8%
1940	431,052,674	412,040,349	19,012,325	4.4%
1939	378,473,829	359,784,771	14,894,134	3.9%

(I.C.C. Statistics for Spector (appellant).)

1942	\$2,384,862 ^a	\$2,416,644	\$31,842 (D)	1.3% (D)
1941	2,478,984	2,434,068	44,916	1.8%
1940	1,724,955	1,712,804	12,151	0.7%
1939	1,204,390	1,157,962	46,580	3.8%

The Commerce Clause Has Been Implemented.

In numerous decisions of this Court, dealing with tax matters, reference is made to the broad powers of Congress to take appropriate action with respect to burdens on interstate commerce, as compared with the narrower jurisdiction of this Court. The observation of Judge Hand, of the Circuit Court (dissenting) is important in approaching these matters from the practical viewpoint. He said:

"they (the states) have representations in Congress which the nation has not in their legislatures"^{10a}

In many cases, this Court has held that the "commerce clause", standing alone, was sufficient to prevent the burdening of interstate commerce and in other cases it has held that the "commerce clause" must be implemented by Congressional action, before it becomes operative to prevent burdens on interstate commerce.

Year	Operating Income	Net Operating Revenue	Operating Taxes	% of Taxes to Gross	% of Taxes to Net
(Motor carriers of Property, omitting 000)					
1942	\$587,869.	\$31,397.	\$40,100.	6.8%	130.%
1941	560,166.	26,934.	40,231.	7.1%	150.%
1940	431,052.	19,012.	31,503.	7.3%	160.%
1939	378,473.	14,894.	26,636.	7.0%	180.%

(Motor carriers of Passengers, omitting 000)					
1942	\$251,192.	\$86,727.	\$18,722.	7.4%	23.%
1941	148,876.	28,955.	14,134.	9.5%	43.%
1940	114,741.	16,267.	11,606.	10.1%	72.%
1939	113,458.	18,821.	11,456.	10.1%	63.%

(Interstate Commerce Commission statistics for Class I Railroads, omitting 000)

1942	\$7,465,822.	\$2,864,739.	\$248,230.	3.3%	8.8%
1941	5,346,639.	1,682,467.	223,937.	4.1%	13.9%
1940	4,296,600.	1,207,183.	214,914.	5.0%	17.9%
1939	3,995,004.	1,076,794.	236,946.	5.9%	26.3%

*This column interpolated.

^{10a}T. 134.

¹⁰Interstate Commerce Commission statistics for "Class I Motor Carriers" and for "Class I Railroads" (taken from the several reports for the years indicated).

We submit that in transportation, the "commerce clause" has been implemented by many acts of Congress, showing in no uncertain terms that interstate transportation was of such national concern that it shall be beyond the power of the states to destroy it.

In a number of decisions involving taxation of telegraph companies, this Court referred to the fact that Congress had enacted legislation evidencing its intention to secure and protect the availability of such instrumentalities.¹¹

In tax cases involving pipe lines, this Court referred to Federal regulation and tariffs published with the Interstate Commerce Commission, to distinguish interstate commerce from intrastate business to prevent the burdening of the former.¹² In another pipe line case involving state requirements for the extension of pipe lines, this Court referred to the fact that extensions were subject to the issuance of certificates of convenience and necessity by the Federal Power Commission, and could not be required by a state.¹³

In railroad cases the protective arm of Federal policy has served as a reminder that burdensome capital expenditures might not be required of interstate carriers without

¹¹The Pensacola Teleg. Co. v. The Western Union Teleg. Co. 96 U. S. 1, 24 L. Ed. 708.

Western Union Teleg. Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067.

Western Union Teleg. Co. v. Mass., 125 U. S. 530, 31 L. Ed. 790.

Ratterman v. Western Union Teleg. Co., 127 U. S. 411, 32 L. Ed. 229.

Leloup v. Port of Mobile, 127 U. S. 640, 32 L. Ed. 311.

Western Union v. Seay, 132 U. S. 472, 33 L. Ed. 409.

Williams v. Talledega, 226 U. S. 404, 57 L. Ed. 275.

¹²Eureka Pipe Line v. Hallanan, 257 U. S. 265, 66 L. Ed. 227.

¹³Ill. Nat. Gas Co. v. Central Ill. Public Ser. Co., 314 U. S. 498, 86 L. Ed. 371.

approval of the Interstate Commerce Commission.¹⁴ Since the Shreveport Case¹⁵ and the Transportation Act of 1920¹⁶, states may not pursue an intrastate rate policy which burdens interstate commerce¹⁷. By numerous decisions under the Safety Acts, this Court has broadly construed the intent of Congress to occupy those fields and exclude the states from burdening interstate commerce, regardless of the fact that Congress had not specifically itemized each and every device involved.¹⁸ Radio has been recognized and protected as interstate commerce, by both Congress and this Court.¹⁹

With respect to highways, Congress has, through the Federal Aid Acts, not only become interested in interstate commerce but it has also acquired a huge financial interest in interstate highways.²⁰ In *Bush v. Maloy*, this Court said:

"The Federal Aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be open to interstate commerce."

¹⁴*Railroad Com. v. Southern P. Co.*, 264 U. S. 331, 68 L. Ed. 713.

I. C. C. v. Los Angeles, 280 U. S. 52, 74 L. Ed. 163.

¹⁵*Houston, E. & W. T. R. Co. v. U. S.* (Shreveport case), 234 U. S. 342, 58 L. Ed. 1341.

¹⁶Interstate Commerce Act, Sec. 13(4).

¹⁷49 U. S. C. A. 13(4) and cases cited.

¹⁸*Erie R. Co. v. N. Y.*, 233 U. S. 671, 58 L. Ed. 1149.

Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. Ed. 237.

Napier v. A. C. L. Ry. Co., 272 U. S. 605, 71 L. Ed. 432.

¹⁹*Fisher's Blend Station v. Tax Com.* 297 U. S. 650, 80 L. Ed. 956.

²⁰*Bush v. Maloy*, 267 U. S. 317, 69 L. Ed. 627.

Buck v. Kuykendall, 267 U. S. 307, 69 L. Ed. 623.

We do not contend that Congress has excluded the states from taxing the physical facilities of interstate commerce, but we do contend that Congress has repeatedly expressed such concern for that commerce, that the states are not free to pursue any policy which produces results inconsistent with the repeatedly declared policy of Congress.

There is no rule that we know of, which establishes legislative standards or patterns for Congressional action whereby interstate commerce is protected by implication, as distinguished from specific action, nor is there any rate for determination of the efficacy of the commerce clause, standing alone.

Every time Congress has acted with respect to interstate commerce, it has been to relieve that commerce of some burden. To recognize that Congress had expressed itself so often and in so many ways, all for the protection of interstate commerce, and at the same time view the states as being free to employ an unrestricted and unrestrained tax policy, which has the capacity for injury to interstate commerce, far in excess of the matters upon which Congress has specifically acted, is hardly logical.

The Decisions of This Court, Are In Effect, Part of the Interstate Commerce Act.

The decisions of this Court, under the "commerce clause" alone, have made it unnecessary for Congress to enact further legislation dealing with the subject of taxation on the gross revenues of carriers engaged in interstate commerce, and Congress has acted in the light of those decisions.

In connection with the Motor Carrier Act of 1935, Congress enacted a declaration of national transportation pol-

icy, and, in 1940, that policy was reenacted in connection with the entire Interstate Commerce Act.²¹

When the Motor Carrier Act, 1935, was enacted the states feared that their right to tax for the use of highways within the respective states might be jeopardized. To meet that point, raised by the states, Congress wrote into the law a provision disclaiming any intention to interfere with the "powers of taxation of the several states" (Sec. 202(b)). The only important tax issues, then confronting the motor carrier industry, were taxes for the use of highways, which this Court had repeatedly held to be within the power of the states.

Taxation of the unapportioned revenues of carriers, and of apportioned revenues from interstate commerce (unless levied as in lieu taxes) had long been foreclosed by the decisions of this Court, and were recognized as not being within the "powers of taxation of the several states". Presumably, Congress, in enacting Sec. 202(b) of the Motor

²¹"National Transportation Policy.

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 49 U. S. C. A. at page 4 of supplement.

Carrier Act, acted in the light of the decisions of this Court, as they stood at that time, with respect to transportation agencies engaged in interstate commerce. To that extent, the then controlling decisions of this Court, and the Acts of Congress, are inter-related as to transportation. It would appear to be inappropriate to permit the states to now adopt a new policy, at variance with the prior decisions of this Court and upon which Congress must have relied.^{21a}

In this case, no goods are made or sold by plaintiff, no transactions are negotiated or consummated, no titles pass, both consignee and consignor may be non-residents. It does not follow from the service of transportation, that any portion of the charges for transportation on shipments originating in Connecticut, are paid for by any one in that state, or that the goods were even manufactured or sold in Connecticut. The service rendered by plaintiff and the charges therefor, are regulated by federal statutes. The relationship between a common carrier and a shipper are not private contracts in the normal concept of contracts.

If the few states, in which the nation's great ports are located, can claim that traffic, which a common carrier transports, to or from the interior, was business done "in the state", they certainly could levy a tribute on the hinterland.

Plainly the tax, in this case, as applied, is levied on the privilege of engaging in interstate commerce.

^{21a}See Ill. N. Gas Co. v. Cent. Ill. P. S. C., 314 U. S. 498, 86 L. Ed. 371, and particularly note (1) in the opinion.

POINT 1.

THE STATE OF CONNECTICUT HAS IMPOSED A TAX WHICH, AS APPLIED IN THIS CASE, IS AIMED DIRECTLY AT INTERSTATE COMMERCE, AND THEREBY CONTRAVENES THE COMMERCE CLAUSE.

We submit that the Connecticut law is invalid tested by every principle of taxation which this Court has ever considered, including dissenting opinions. True, in some instances, there have been strong expressions with respect to the powers of the states, in the absence of federal action, but in none of those cases was there a showing that the tax involved would destroy as distinguished from burdening commerce.

Plaintiff is certificated under an Act of Congress, and all its rates and charges are regulated by the Interstate Commerce Commission. It does not and cannot engage in intrastate transportation in Connecticut, and it is not engaged in any other kind of business in Connecticut or elsewhere. It pays, in numerous states, all applicable taxes on property, use taxes, excise taxes, vehicle licenses, occupancy taxes, corporate taxes, social security, etc.²² It and its subsidiary company, which owns most of the trucks, pay in taxes very substantial amounts²³ and pay in proportion

²²Witness Arnold, T. 48-51, 57, 64-66.

²³License and taxes paid by Wallace T. Co. \$13,144 Ex. 16,

T.—

Taxes paid by Spector \$18,269.20 for year 1940, as shown by annual report filed with Interstate Commerce Commission. Exhibit 16 shows that the Wallace Co., paid under Road Expenses-Tolls, Etc., \$10,987.45, however the amount represented by tolls is not segregated. Exhibit 16 also shows that Wallace Co., paid for motor fuel \$141,962.72 which amount includes taxes on gasoline, which are not segregated, but would have been segregated had the amounts been paid directly by Spector. If the gasoline tax be estimated at 30% of the wholesale cost the tax would amount to approximately \$40,000. The taxes paid by the contractors who perform pick-up and delivery service and by the owner-drivers are not segregated, nor are any figures available of record from which any calculations might be made.

to gross revenues as much as the states impose on other carriers of its kind.²⁴

This Court has on several occasions approved in lieu taxes, measured by income or other basis but the basis employed was merely the measure of the tax to be imposed on a taxable subject, such as tangible property,²⁵ but this is not an in-lieu tax.

The tax is not a corporate franchise tax on a domestic corporation engaged partially in intrastate commerce because plaintiff is not a domestic corporation. Therefore, the tax cannot be sustained on the domestic corporation basis and is distinguishable from such cases which have been approved by this Court²⁶ and disapproved when the

²⁴See Note 10.

²⁵Western Union T. Co. v. Mass, 125 U. S. 530, 31 L. Ed. 790.
Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. Ed.

311.
U. S. Exp. Co. v. Minn., 223 U. S. 335, 58 L. Ed. 461.
Cudahy Packing Co. v. Minn., 246 U. S. 450, 62 L. Ed. 827.
Pullman Co. v. Richardson, 261 U. S. 330, 67 L. Ed. 682.
A. C. L. R. Co. v. Doughton, 262 U. S. 413, 67 L. Ed. 1051.
Ith. Central R. Co. v. Minn. 309 U. S. 157, 84 L. Ed. 670

²⁶B. & O. R. Co. v. Md. 21 Wall. 456, 22 L. Ed. 678.
K. C. Ft. T. & S. M. R. Co. v. Botkin, 240 U. S. 227, 60 L. Ed.

617.
Matson Nav. Co. v. State Bd. of Equalization, 297 U. S. 441,
80 L. Ed. 791.

Northwest Air Lines, Inc. v. Minn., — U. S. —, 88 L. Ed.
956.

domestic corporation was exclusively engaged in interstate commerce.²⁷

The tax is not a tax on a foreign corporation for the privilege of doing intrastate business within the state because the plaintiff is not engaged in intrastate commerce. Therefore, it cannot be justified on that ground and is distinguishable from cases which have been approved by this Court.²⁸ In this connection it should be pointed out that the absence of local intrastate business is not a matter of choice resting with plaintiff, because Connecticut law requires proof of public convenience and necessity before a carrier may engage in intrastate operations.²⁹ The mere qualification to do business in the state as a foreign corporation, for the purpose of executing a lease agreement, has no relation to the business of conducting intrastate transportation. The learned Court of Appeals seems to have misconceived the facts in connection with this matter. There is no possible relationship between licensing a truck and obtaining a certificate of convenience and necessity to engage in interstate commerce for hire. Even if plaintiff

²⁷Phila. & Southern Mail Steamship Co. v. Pa. 122 U. S. 326, 30 L. Ed. 1200.

Puget Sound Stevedoring Co. v. Tax Comm., 302 U. S. 90, 82 L. Ed. 68.

Gwin, White & Prince v. Henneford, 305 U. S. 434, 83 L. Ed. 272.

²⁸Pullman Palace Car Co. v. Pa. 141 U. S. 18, 35 L. Ed. 613, modified in Union Tank Car Co. v. Wright, 249 U. S. 275, 63 L. Ed. 602.

Maine v. Grand Trunk Ry. 142 U. S. 217, 35 L. Ed. 994.

St. L. S. W. R. Co. v. Ark. 235 U. S. 350, 59 L. Ed. 265.

Pullman Co. v. Richardson, 261 U. S. 330, 67 L. Ed. 682.

Wis. v. J. C. Penny Co. 311 U. S. 435, 85 L. Ed. 267.

²⁹Sec. 577c General Statutes of Connecticut, 1935 Supplement.

could engage in intrastate commerce, did not do so, and the tax could not be applied.³⁰

The tax is not, and does not purport to be, a state tax for the use of the highways, such as (when reasonable) have been approved by this Court³¹ and disapproved when not properly apportioned.³² In this connection the Court of Appeals intimates that possibly the tax would be valid if it were considered to be a tax for the use of highways. However, it is clear that the tax is neither a tax for the use of highways, nor is it a tax having any relationship to transportation of any kind. It is a general business tax imposed on all corporations except railroads and certain other public utilities. The courts cannot supply a special basis for the tax, if the Legislature did not do so.

This brings us to the inquiry as to what, if any, service of government or benefit of government, the State of Connecticut confers on the interstate business of plaintiff for which it may properly exact an additional tax from plaintiff. This Court said in the case of *Wisconsin v. J. C. Penny Co.*:³³

"The simple but controlling question is whether the state has given anything for which it can ask return."

³⁰*Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555, 69 L. Ed. 439.

Anglo Chilean Nitrate v. Ala. 288 U. S. 218, 77 L. Ed. 710.

³¹*Dixie Ohio Exp. Co. v. State Rev. Com.*, 306 U. S. 72, 83 L. Ed. 495.

Clark v. Paul Gray, 306 U. S. 583, 83 L. Ed. 1001.

Interstate Buses v. Blodgett, 276 U. S. 245, 72 L. Ed. 551.

Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199.

Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222.

³²*McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 84 L. Ed. 683.

³³*Wisconsin v. J. C. Penny Co.*, 311 U. S. 435, 85 L. Ed. 267.

If we turn to the primary evidence, the statute itself, we find that the tax is exacted "upon its franchise for the privilege of carrying on or doing business within the state". Plaintiff is exclusively engaged in interstate transportation, and that is a business with respect to which the state may neither grant nor withhold the privilege.³⁴ The privilege of engaging in interstate commerce and the duty to continue to engage in such operations and to continue to render reasonably adequate service does not arise under the laws of any state, but arises solely by virtue of an act of Congress and a certificate of convenience and necessity, under Part II of the Interstate Commerce Act.³⁵ Connecticut specifically withheld from plaintiff, the privilege of engaging in intrastate commerce.^{35a}

This Court has consistently held that the property of foreign corporations engaged as carriers in interstate commerce may be taxed by the state in which the property is located,³⁶ but this Court has also consistently held that the gross receipts, *as such*, of foreign corporations engaged as

³⁴Buck v. Kuykendall, 267 U. S. 307, 69 L. Ed. 623.

Bush v. Maloy, 267 U. S. 317, 69 L. Ed. 627.

³⁵49 U. S. C. A. 306, 307

^{35a}Exhibits 3 and 4.

³⁶Western Union T. Co. v. Mass. 125 U. S. 530, 31 L. Ed. 790.

Pullman Palace Car Co. v. Pa., 141 U. S. 18, 35 L. Ed. 613.

Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Backus, 154 U. S. 439, 38 L. Ed. 1041.

Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. Ed. 311.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. Ed. 899.

Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. Ed. 708.

Pullman Co. v. Richardson, 261 U. S. 330, 67 L. Ed. 682.

A. C. L. R. Co. v. Doughton, 262 U. S. 413, 67 L. Ed. 1051.

Great Northern Ry. Co. v. Minn. 278 U. S. 503, 73 L. Ed. 477.

Ill. Central Co. v. Minn., 309 U. S. 157, 84 L. Ed. 670.

carriers in interstate commerce may not be taxed by a state, and this has been true regardless of whether the carrier's receipts were derived exclusively from interstate commerce or only a portion was derived from interstate commerce,³⁷ likewise the gross receipts from interstate commerce, of domestic corporations, may not be taxed.^{37a}

In a number of cases gross receipts or other bases, *properly allocated*, have been used and approved as the measure for taxes on real and personal property. But in those cases the tax was really against the property and not against the gross receipts and were sustained because they were in lieu taxes.³⁸ When the basis for taxation was inequitable or a unit value rule unduly reached extraterritorial values, the tax has been disapproved.³⁹

³⁷Fargo v. Stevens, 121 U. S. 230, 30 L. Ed. 888.

Ratterman v. Western Union T. Co. 127 U. S. 411, 32 L. Ed. 229.

Western Union v. Seay, 132 U. S. 472, 33 L. Ed. 409.

Meyer v. Wells Fargo & Co. 223 U. S. 298, 56 L. Ed. 445.

Fisher's Blend Station v. Tax Com. 297 U. S. 650, 80 L. Ed. 956.

^{37a}Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. Ed. 1031.

³⁸Western Union T. Co. v. Mass. 125 U. S. 530, 31 L. Ed. 790.

Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. Ed. 994.

Postal Telegr. Cable Co. v. Adams, 155 U. S. 688, 39 L. Ed. 311.

Wis. & M. R. Co. v. Powers, 191 U. S. 379, 48 L. Ed. 229.

U. S. Exp. Co. v. Minn. 223 U. S. 335, 56 L. Ed. 461.

Cudahy Packing Co. v. Minn. 246 U. S. 450, 62 L. Ed. 827.

Pullman Co. v. Richardson, 261 U. S. 390, 67 L. Ed. 682.

A. C. L. R. v. Doughton, 262 U. S. 413, 67 L. Ed. 1051.

Great Northern Ry. Co. v. Minn. 278 U. S. 503, 73 L. Ed. 477.

Ill. Central Co. v. Minn. 309 U. S. 157, 84 L. Ed. 670.

³⁹Fargo v. Hart, 193 U. S. 490, 48 L. Ed. 761.

Union Tank Line Co. v. Wright, 249 U. S. 275, 63 L. Ed. 602.

Wallace v. Hines, 253 U. S. 66, 64 L. Ed. 782.

New Jersey Bell Tel. Co. v. State Bd. of T. & A. 280 U. S. 338, 74 L. Ed. 463.

In some cases, tax laws with provisions broad enough to cover intrastate as well as interstate commerce, have been construed to apply to intrastate commerce only, in order to save their constitutionality,⁴⁰ and that could be done here.

A franchise tax may not be imposed on an instrumentality of interstate commerce even though it be also used for intrastate commerce.^{40a}

The facts in this case are clear and simple. Plaintiff is a foreign corporation, incorporated in Missouri and having its commercial domicile in Illinois. It is exclusively engaged in interstate commerce, and is not permitted to engage in intrastate commerce. It is subject to all normal taxes, and the additional tax imposed is not an in lieu tax and the statute itself states that it is for the privilege of engaging in business within the state. The only business engaged in, and the only business which the plaintiff can engage in, is interstate commerce.

The Connecticut Act was copied in statutory form, substantially as found in a prior Massachusetts Act. This Court found the Massachusetts law invalid in *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 69 L. ed. 917. In the *Alpha Cement Case*, there was no disallowance of expenses and inclusion of extraterritorial revenues, such as is involved in the Connecticut Act, as applied in this case. The Connecticut Act is invalid for the reasons stated in the *Alpha Cement case* and for the additional reasons just stated and which will be discussed under Point 2.

It is clear:

1. That the taxes levied are against a subject which is beyond the taxing power of the state.
2. The tax in no sense compensates for any privilege or protection afforded by the state.

⁴⁰*Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035.
⁴¹*St. Louis & S. W. R. Co. v. Ark.*, 235 U. S. 350, 59 L. Ed. 265.

^{40a}*Coorrey v. Mountain States Tel. & Tel. Co.* 294 U. S. 384, 79 L. Ed. 934.

POINT 2.

**THE STATE ACT, AS APPLIED, SUBJECTS INTER-
STATE COMMERCE TO MULTIPLE OR CUMULA-
TIVE TAXES WHICH IMPOSE A DESTRUCTIVE
BURDEN ON INTERSTATE COMMERCE IN CON-
TRAVENTION OF THE COMMERCE CLAUSE.**

The Connecticut statute purports to be a tax on "net income", however certain expenses are disallowed and to that extent it is not a net income tax and becomes a tax on gross income. It is necessary to examine the nature and quantity of the expense items which are disallowed, in order to appraise the actual effect of the law.

The disallowed items are "*interest and rent paid during the income year*".⁴¹ Plaintiff uses a large amount of equipment which it does not own. Most of the equipment used is obtained under contract with a wholly owned subsidiary corporation, the Wallace Transportation Company.⁴² Other equipment is obtained from so-called owner-operators, who perform over-the-road service, and a third group of facilities is obtained through contracts with local operators who perform pick-up and delivery service.

The consideration paid by plaintiff to the owners of the equipment used, under contracts, raises an important issue in determining the amount of plaintiff's "net" revenue which the state seeks to tax. The state law does not allow "rent" as a deductible expense and the state calls 40% of the payments for hired services, "rent". Therefore, it becomes necessary to examine plaintiff's arrangements with those from whom it secures equipment, for the purpose of determining whether the payments made therefor are properly denominated "rent".

⁴¹Sec. 419c—Quoted in appendix.

⁴²Witness Fisher T. 29, 30.

Where the services of local operators are engaged for pick-up and delivery work, such operators are compensated at so much per hundred pounds for the freight handled.⁴³ They own and license the equipment, furnish the driver, maintain the equipment, furnish the tires, oil and gasoline and for all practical purposes are independent contractors. Clearly, such arrangements are contracts for services and no part of their compensation is "rent".

Where owner-drivers are employed,⁴⁴ that is to say individuals who own their equipment and make their living by supplying over-the-road transportation service to carriers, such owner-drivers own the trucks, maintain them, supply the gasoline and oil and usually drive the vehicles themselves, although sometimes they employ and furnish drivers, and for all practical purposes are independent contractors.

This Court had occasion to consider the status of these so-called owner-drivers in the Rosenblum case.⁴⁵ This Court has held that a common carrier is free to engage the services of others in the performance of its obligations as a common carrier.⁴⁶ Clearly, no part of the compensation paid to owner-drivers is "rent", in the usual sense of the term.

We next come to the status of the arrangements between plaintiff and its subsidiary, the Wallace Company,⁴⁷ and where the drivers were placed on the payroll of the plaintiff. The Wallace Company did more than furnish trucks—

⁴³Witness Fisher, T. 47.

⁴⁴About 40 or 50 owner-drivers are used: Witness Arnold, T. 63.

⁴⁵U. S. v. Rosenblum, 315 U. S. 50, 86 L. Ed. 671.

⁴⁶Thompson v. U. S., — U. S. —, 88 L. Ed. 326.

St. Louis Drayage Co. v. L. & N. R. R. Co. 65 Fed. 39.

⁴⁷Witness Fisher, T. 25, 26.

Exhibit 16, T.—

it also furnish the gasoline, oil and tires, and maintained the trucks.⁴⁸ It also paid the taxes and licenses, and taxes on gasoline, which is one of the means by which states collect taxes for the use of highways.

The State Tax Commissioner or Auditor apparently realized that he was in some difficulty in denominating all of the payments made by plaintiff, for the services of its various types of contractors, as "rent". He allocated 60% of the amounts paid by plaintiff for the services contracted for, as an operating expense and assumed that 40% would represent "rent".⁴⁹

Examination of Exhibit 16 discloses that there was little if anything, in the account between plaintiff and Wallace which is rent as distinguished from 100% operating expenses.⁵⁰

The State appears not to have discovered, until the hearing before the District Court, that plaintiff employed and paid the drivers of the equipment furnished by the Wallace Company.⁵¹

Presumably, as the Court of Appeals pointed out, had the state been aware of the fact that plaintiff paid such drivers, all of the amounts paid to the Wallace Company would have been called "rent" and disallowed as expense. Under these circumstances, the amount of tax, which might be exacted by Connecticut, *would be increased more than 100% over the amounts here involved.*

The practice of augmenting the supply of transportation facilities by contracts, is not peculiar to plaintiff nor unusual in the motor carrier industry, as shown by the amount

⁴⁸Witness Arnold, T. 55-57.

Exhibit 16, T.—

⁴⁹Witness Steege, T. 75-80.

⁵⁰Witness Arnold, T. 56, 57.

Exhibit 16, T.—

⁵¹Witness Arnold, T. 62-63.

of "purchased transportation" reported to the Interstate Commerce Commission.⁵² Railroads, to a great extent, use equipment owned by other lines and also use equipment owned by non-carriers, who furnish tank cars and refrigerator cars.⁵³ No one has heretofore suggested that the amounts paid for this equipment was not a true operating expense. In the motor carrier industry the augmentation of transportation facilities by contract is termed "purchased transportation", under the accounting rules prescribed by the Interstate Commerce Commission.⁵⁴

To illustrate the importance of the item of purchased transportation in connection with the motor carrier industry, we turn to the reports of the Interstate Commerce Commission to show that "purchased transportation" and "leased vehicles" account for a large portion of the total vehicle miles and revenues of that portion of the industry which is engaged primarily in intercity operations.⁵⁵

⁵²See Note 55.

⁵³Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. Ed. 785.

Fargo v. Stevens, 121 U. S. 230, 30 L. Ed. 888.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. Ed. 899.

Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. Ed. 708.

Cudahy Packing Co. v. Minn. 246 U. S. 450, 62 L. Ed. 827.

Union Tank Line Co. v. Wright, 249 U. S. 275, 63 L. Ed. 602.

⁵⁴Witness Arnold, T. 61.

⁵⁵The following figures were taken from Interstate Commerce Commission statistics of Class I Motor Carriers of Property Engaged Preponderantly in Intercity Service for the year 1942:

Carriers operating with owned equipment and purchased transportation—gross revenues	\$274,516,619 (Table 48)
Carriers operating with principally owned equipment—gross revenues	\$247,482,818 (Table 4)
Mileage of owned vehicles	1,471,874,488
Mileage of leased vehicles	160,841,457
Mileage of "purchased transportation"	407,382,210

Recently the Circuit Court of Appeals (6th C.C.A.) had occasion to discuss purchased transportation and to consider the liability of common carriers using "purchased transportation" in connection with Social Security Taxes. It was held that the suppliers of purchased transportation were independent contractors and that the carriers were not liable for Social Security Taxes on the employees of the independent contractors.⁵⁶

It has been suggested that the exclusion of "rent" from deductible expenses is reasonable, because it equalizes the tax burden as between owners and lessors of property. Presumably the 40% of "rent" which the Tax Commissioner disallowed as a deductible item, was intended to represent the cost of operating the vehicle as distinguished from wages paid drivers. No reason was suggested why drivers' wages are an expense and mechanics' wages, taxes and gasoline, are "rent".

Here, the statute, as applied, with respect to "rent", instead of being an equalization factor becomes a major factor in discrimination. A carrier owning equipment could charge to expense all maintenance, parts, supplies, fuel, taxes, etc., whereas, a purchaser of services has 40% of such expenses denominated "rent" and excluded from expenses, under the Connecticut law, as applied. In long distance interstate transportation by truck, the costs of such items (exclusive of drivers) are more important than the purchase price of the truck.

We do not contend that the state law is bad simply because it does not exactly follow accounting procedure prescribed by the Interstate Commerce Commission, but we contend that it is bad because the Connecticut formula is so arbitrary in itself, that it unduly burdens interstate commerce in contravention of the commerce clause and

⁵⁶U. S. v. Mutual Trucking Co., 141 Fed. (2d) 655.

deprives plaintiff of the due process of law under the 14th Amendment.

In passing, it should be pointed out that there is no competition between the interstate commerce transported by plaintiff, and intrastate commerce carried on by any carrier in Connecticut, therefore there is no occasion to equalize any tax burdens which Connecticut may impose on its own citizens or commerce.

We have pointed out the foregoing facts to illustrate the error made by the State in calling this expense "rent", but we do not rest our case on terminology; we say that the state law is unconstitutional even if the payments are "rent": No state can strangle interstate commerce under any form of statute.

The state has relied very largely on the decision of this Court in a case upholding a tax on net *operating income*, in which deductions for "rent" were not allowed. *Atlantic Coast Line R. Co. v. Doughton*.⁵⁷ However, that case differed in important particulars from the issues here presented. In that case the tax was on the income from property. The "rent" which was disallowed was the rent paid for leased railroads, but the rent paid for "cars" was allowed. Rent, in comparatively nominal amounts, paid for the use of real property of a permanent nature is entirely different from compensation for transportation services and the use and maintenance of trucks and including the fuel, maintenance, etc. In the *Atlantic Coast Line Case*, the "rent" was in the nature of interest on capital, whereas here, the payments represent operating expenses. Those distinctions were carefully noted in that case. There the results did no violence to interstate commerce, but here the result is quite different. There the tax was apportioned to earnings in the state, whereas, here, the tax is not appor-

⁵⁷ *Atlantic C. L. R. Co. v. Doughton*, 262 U. S. 413, 67 L. ed. 1051.

tioned. There the companies were engaged in intrastate commerce, and here the plaintiff is engaged in interstate commerce.

By the process of disallowing 40% of the expenses for purchased transportation, Connecticut determined that plaintiff had a net income of \$425,291.01 in the year 1940, as against an actual net income, as determined by the accounting regulations of the Interstate Commerce Commission, of \$12,151.⁵⁸ Connecticut determined, under its formula, that plaintiff had a net income in 1940 of approximately 40 times the actual net income. Connecticut allocates as net income arising in Connecticut, an amount of \$67,304.24, as compared with an actual net earning of the company of \$12,151.00 for its entire system located in 12 states. Connecticut exacts a tax of 2% on the income as computed by its formula and as allocated to Connecticut, by its method, and claims, as a tax on the privilege of doing interstate business for the year 1940, \$1,346.08, which is actually 11% of the actual net earnings of plaintiff in all twelve states in which it operates.

If there is any theory upon which Connecticut can levy this tax, then every one of the twelve states through which plaintiff operates may levy a similar tax, and such multiple or cumulative tax would, to a mathematical certainty, cause the plaintiff corporation to be operated at an out of pocket loss from which there would be no escape.

⁵⁸Figures taken from Interstate Commerce Commission statistics for the year 1942:

	Operating Income	Operating Expenses	<i>Spector.</i> Net Operating Revenue	Purchased Transporta- tion*
1942	\$2,384,802	\$2,416,644	\$31,842 (D)	\$1,045,221
1941	2,478,984	2,434,068	44,916	1,391,308
1940	1,724,955	1,712,804	12,151	991,122
1939	1,204,590	1,157,962	46,580	537,183

*Included in "operating expenses" but shown separately for the purpose of illustrating the importance of the amount involved.

The tax levied by Connecticut is multiple and cumulative for two reasons: First, by disallowing expenses it is in the nature of a tax on gross; and secondly, the determination of income alleged to have been earned in the state, is not based on a formula which even approximates an accurate determination of business "in the state", if any interstate commerce is business "in the state".

Connecticut applies the tax to the total freight charge on all freight shipments originating in, or originally billed by plaintiff from a point in Connecticut, regardless of destination and without attempting to determine the portion of the through freight charges earned within the State of Connecticut.⁵⁹

Plaintiff's operations extend from the Atlantic Coast to the Mississippi River, a distance of a thousand miles. All of plaintiff's business out of Connecticut is necessarily long-haul business by reason of the limitations and restrictions imposed in plaintiff's certificate of convenience and necessity issued by the Interstate Commerce Commission.⁶⁰ As shown by Exhibit 5, plaintiff operates between an eastern area and a western area, but does not operate within either the eastern or western areas. In other words, plaintiff may not render local service between Connecticut and New York or between Connecticut and Massachusetts.⁶¹ The total mileage of plaintiff by states is: Connecticut 300; Massachusetts 406; New York 774; New Jersey 138; Pennsylvania 1382; Ohio 1210; Indiana 1166 and Illinois 1551.⁶² The total route mileage operated by plaintiff is 7,077 miles, of

⁵⁹Witness DeCicco, T. 73.

⁶⁰Spector Motor Service, Inc., 32 M. C. C. 443.

⁶¹Witness Fisher, T. 22.

⁶²Witness Fisher, T. 19, 20.

which only 4.23% is in Connecticut and 95.77% is in other states.⁶³

The State of Connecticut contends that for the year 1940 \$587,973.59 or 34% of plaintiff's gross revenues arose in Connecticut,⁶⁴ whereas plaintiff's mileage in Connecticut was only 4.23%. With the same mileage, the state claims as to other years that business up to about 50% of the gross originated in Connecticut. It is undisputed that the state has taken all of the revenue for all of the transportation from Connecticut clear through and across numerous states to destination. The fact that Connecticut does not include in its computations, revenues on freight terminated in Connecticut, by no means compensates for the inclusion of revenues earned over 7,077 miles of system lines, when only 4.23% of the mileage is in Connecticut. This Court has repeatedly condemned tax laws which are inequitable or which reach extraterritorially.⁶⁵

In the case of interstate carriers exclusively engaged in the handling of interstate commerce, there is no rule of law which differentiates between interstate traffic which originates and traffic which terminates in a state and which would subject one class to a tax burden not imposed on the other. The administrative application of such a distinction, as undertaken by Connecticut, must rest on nothing more than an appreciation of the weakness of their position with respect to any of the traffic. If Connecticut can tax traffic originating in Connecticut under the present act, then we know of nothing to prevent it from taxing traffic which also terminates in Connecticut, and likewise all other states could do the same.

⁶³Witness Fisher, T. 22, 23, and Exhibit 8, T.

⁶⁴Exhibit 17, T.

⁶⁵See Notes 39 and 70. *Hans Rees Sons v. North Carolina*, 283 U. S. 133, 75 L. ed. 904.

The Circuit Court of Appeals said with reference to cumulative and multiple taxation:

"It is objected that if Connecticut can levy this tax that all states through which plaintiff's trucks operate can levy a somewhat similar tax, and plaintiff will be burdened by the inequity of multiple taxation. There seems to be two ready answers to this objection. The first is that the record does not suggest that other states are making such levies, and there will be time enough to consider the problem of multiple taxation when and if it arises. *Henneford v. Silas Mason Co.*, 300 U. S. 577, 587, 57 S. Ct. 524, 81 L. Ed. 814. The second, is that if in fact other states can show as rational a basis for taxation on this business as is here shown there seems no reason why plaintiff, like its competitor railroads, should not pay the taxes so properly assessed."⁶⁰

Dealing with what the Circuit Court of Appeals has said, it is clear that the court misconceived the facts. No railroads are taxed by Connecticut or by any other state under any laws similar to that here sought to be applied. No other state has attempted to impose a similar tax formula on anyone.⁶¹ The Connecticut statute, here involved, does not concern railroads as they are covered by entirely different statutes applying an entirely different method of taxation, which are in lieu taxes and are apportioned according to mileage.⁶² In those railroad taxing acts, the state has observed the decisions of this Court.

It is true that other states do not now impose such a tax as Connecticut undertakes to levy. They could not do so under the decisions of this Court. Connecticut appears to be the first state that has ever tried to levy such a tax on

⁶⁰T. 146.

⁶¹Witness Steege (for the state) T. 76.

⁶²See Appendix for statute taxing railroads.

motor carriers. As administered, departures have been made from both the transportation tax policy of Connecticut, as well as from the decisions of this Court. Other states have sought to levy multiple and cumulative taxes on railroads, and in every instance those laws have been set aside by this Court. The Connecticut law was passed in 1935, but insofar as plaintiff is advised, this is the first time Connecticut has ever sought to enforce it against an interstate motor carrier, and it seems that Spector has been selected for a test case.

The *Henneford Case*⁶⁹ cited by the Circuit Court of Appeals involved a use tax and had nothing to do with transportation. Use taxes have been recognized as compensating taxes and nothing of this nature is involved in this case. Interstate commerce had ended when the use tax was applied in the *Henneford Case*, and the state statute carefully provided against cumulative taxes in that the use tax was not imposed if the owner had paid a sales tax in any state.

Where a tax has been laid on the income, or other basis, of a transportation agency, as a measure of the value of other property, and by reason of defects in the formula, the state has reached beyond its borders, this Court has consistently disapproved such taxes and declared them to be multiple and cumulative and illegal burdens on interstate commerce.⁷⁰

Here the Connecticut law overreaches its boundaries to the full extent of taxing all of the revenue earned for the entire transportation journey involving numerous states.

⁶⁹*Henneford v. Silas Mason Co.*, 300 U. S. 577, 81 L. ed. 814.

⁷⁰*Union Tank Line Co. v. Wright*, 249 U. S. 275, 63 L. ed. 602.

Wallace v. Hines, 253 U. S. 66, 64 L. ed. 782.

New Jersey Bell Tel. Co. v. State Bd. of T. & A., 280 U. S. 338, 74 L. ed. 463.

Adams Mfg. Co. v. Storen, 304 U. S. 307, 82 L. ed. 1365.

In striking down multiple and cumulative tax burdens on interstate commerce, this Court has never conditioned its disapproval upon the ground that the tax is not multiple or cumulative simply because no other state has imposed it yet. Our system of taxation by states does not lend itself to state cooperation in tax matters. In the *Henneford Case*, *supra*, this Court pointed out that the tax policy of a state is not dependent upon the tax policy of other states, and said:

"A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere".²¹

The Connecticut tax is illegal when imposed by Connecticut alone and its illegality is not increased or diminished by what other states may do. We respectfully submit that there is no authority for holding, as the Circuit Court of Appeals seems to suggest, *that two or more states must inflict an illegal tax burden before plaintiff may seek relief.*

The Connecticut law is so obviously multiple and cumulative and imposes such an unreasonable burden on interstate commerce, that the submission of figures would merely prove the obvious. However, we have said that the Connecticut law not only imposes an unreasonable burden on interstate commerce, but that it actually has the capacity to annihilate the business of interstate transportation. Having made that statement we now undertake to show the capacity of the statute to annihilate the business of plaintiff and the businesses of all other carriers similarly situated.

By reference to the statistics (note 9) it is shown that for the year 1942, plaintiff had a deficit in net operating

²¹*Henneford v. Silas Mason Co.*, 300 U. S. 577, 587, 81 L. ed. 814, 821. //

revenues of \$31,842, under the accounting procedure prescribed by the Interstate Commerce Commission. That Commission gave full credit for the item of "purchased transportation" amounting to \$1,045,221, which item represented 43% of the \$2,416,644 operating expenses. Under the Connecticut method of computing and taxing as income, 40% of \$1,045,221, the cost of "purchased transportation", the result would be to create a fictitious net income of over \$400,000 as against an actual deficit of about \$30,000.

If Connecticut may lay a tax of 2% on fictitious net income from interstate commerce, then all other states may do so and the carrier would be confronted with an additional tax, which is not in lieu of anything, in an amount of approximately \$8,000 for its system, as opposed to an actual loss of \$30,000. There has never been a year in the operation of the plaintiff corporation, when its actual net income was enough to pay such taxes, if levied by other states, to the full extent of the principle involved. In 1938 and 1942 the company did not earn enough money on its entire operations to pay the tax which Connecticut alone demands.^{71a}

We have shown the large portion of mileage, for the industry as a whole, which is represented by "purchased transportation" (note 55) and (note 9 and 10) we have shown the narrow margin of net income under which this transportation industry, as a whole, operates.

The percentage and importance of expense items which Connecticut disallows is so great and the basis for allocation of income so erroneous that it automatically creates such a large fictitious net income, that the actual net income must fall far short of being sufficient to pay the tax. If the tax is constitutionally sound at 2% it would be sound at 5%; if 40% of expenses may be disallowed, 100% may

^{71a} See notes 4 and 58.

be disallowed, and if traffic which originates in Connecticut may be taxed, so may traffic which terminates in Connecticut.

This transportation industry cannot increase its charges for services every time some state imposes an additional tax, because its charges are fixed by both competition from carriers, which are not subject to this kind of a tax, such as railroads, and by the Interstate Commerce Commission.

As heretofore shown (note 9) the industry operates on a profit of about 5% on its gross business; or, stated in transportation terms, it has an operation ratio of 95%. The exclusion of any part of expenses, which are in the nature of operating expenses, in computing defined "net income", results in a tax on gross income as shown by the following illustration, based on \$100 of gross revenue:

Excluded Expense	Resulting Taxed Gross Revenue
10% of \$100 = \$10.00	95% of \$10.00 = \$9.50
50% of \$100 = \$50.00	95% of \$50.00 = \$47.50
75% of \$100 = \$75.00	95% of \$75.00 = \$71.25
100% of \$100 = \$100.00	95% of \$100.00 = \$95.00

The effect of a 2% tax on defined "net income", with expenses disallowed, affects an industry with a 95% operating ratio (based on \$100 of gross revenue), as follows:

Excluded	True Net Revenue		Reduction
	Before 2% Tax	After 2% Tax	in Net
10% of \$100 = \$10.00	\$5.00	\$4.80	4%
50% of \$100 = \$50.00	\$5.00	\$4.00	20%
75% of \$100 = \$75.00	\$5.00	\$3.50	30%
100% of \$100 = \$100.00	\$5.00	\$3.00	40%

Therefore, a 2% tax on defined income, with 50% of expenses excluded, becomes a tax on 47½% of the gross income and results in a reduction of 20% in the net income or the same as a tax of 20% on net income.

Connecticut does not pro rate taxes on the 4.23% of mileage in that state but borrows enough revenue from the 95.77% of mileage in the other 11 states, to build up a

showing of about 40% of gross revenue as having originated in Connecticut, considering only westbound traffic.

Plaintiff operates in 12 states. Is it not obvious that each state cannot allocate 40% of the gross revenue to itself and find money enough in plaintiff's till to pay themselves off? *The Connecticut Act must be what the cases have referred to as cumulative or multiple taxation.*

Here, plaintiff has met the burden of proof that the statute, as applied, is unconstitutional. The results are not observed in intercorporate accounting, because all of the facts are of record. The unitary rule approved by this Court applies to both plaintiff and its subsidiary, the Wallace Company.^{71b}

The Court of Appeals appears to rely on *Ford Motor Co. v. Beauchamp*^{71c} as authority for a tax which is excessive, measured by physical property, but, in that case, the company held and exercised the right to engage in intrastate commerce, a fact which is not present here.

We respectfully submit that, first, by the grossly inequitable formula applied, and, secondly, by the grossly inequitable method of determining income earned in Connecticut, the state has imposed a tax burden which not only unduly burdens interstate commerce, but actually has the capacity to annihilate the business of corporations engaged in the transportation of interstate commerce, and it is therefore unconstitutional under the commerce clause.

^{71b}Butler Bros. v. McColgan, 315 U. S. 501, 86 L. ed. 991.

^{71c}Ford Motor Co. v. Beauchamp, 308 U. S. 331, 84 L. ed. 304.

POINT 3.

**THE STATE HAS DISCRIMINATED AGAINST INTER-
STATE COMMERCE IN CONTRAVENTION OF
THE COMMERCE CLAUSE AND APPLIED ITS
STATUTE SO ARBITRARILY AND CAPRICI-
OUSLY AS TO DENY PLAINTIFF EQUAL PRO-
TECTION AND DUE PROCESS OF LAW.**

The substance of these issues have been presented in connection with Points 1 and 2 and will not be repeated. There remain to be pointed out some additional elements of discrimination against interstate commerce.

If this statute be viewed as one applicable to interstate and intrastate commerce alike, that would not save it from its discriminatory features. If it is a tax for the privilege of doing business in the state, then it discriminates against and burdens interstate commerce because it taxes such commerce without conferring any benefits. Intrastate operators would receive some benefit from the privilege but this carrier is exclusively engaged in interstate commerce and is not engaged, and not permitted to engage, in business within the state⁷² and would be taxed without benefits.

We cannot believe that the tax can be viewed as having anything to do with the use of highways, and it does not purport to be such a tax. But if it were to be so viewed, that would not save it from discrimination against interstate commerce. Of the thousands of miles of highways in the State of Connecticut, plaintiff is permitted to use only about 300 miles, under the certificate issued by the Interstate Commerce Commission, but plaintiff would be required to pay exactly the same amount as is paid by corporations engaged in intrastate commerce over all of the highways. The tax is applicable to corporations engaged

⁷²Pacific Express Co. v. Seibert, 44 Fed. 310, 316 (affirmed 142 U. S. 339).

in interstate commerce but is not applicable to either individuals or partnerships engaged in either interstate or intrastate commerce.

The tax cannot be said to represent a means of reaching intangible values because, first, it does not purport to do so; secondly, the annual tax is about equal to or in excess of the total value of all of plaintiff's property in the state;^{72a} and thirdly, under the Federal Motor Carrier Act, good will and going concern values arising from the business of engaging in interstate commerce over the highways is not recognized as an asset.⁷³ The State would exact an income from a value which federal law does not permit to produce an income. If viewed as an extra state income for the use of highways, it approaches the federal prohibition against tolls for the use of Federal Aid Roads, as provided in such Acts.^{73a}

For these and the further reasons discussed under Point 2, the statute as applied discriminated against interstate commerce and denies plaintiff corporation due process and equal protection of the law.

^{72a}Witness Fisher, T. 29, Exhibits 12 and 13, T.

⁷³49 U. S. C. A. 316(h).

^{73a}39 Stat. 355, Sec. 1.

POINT 4.

THE STATE LAW IS NOT APPLICABLE TO PLAINTIFF, BUT IF SO, AS ADMINISTERED, IT CONTRAVENES THE CONSTITUTION OF CONNECTICUT.

By Its Terms The Statute Does Not Apply To The Plaintiff.

Where, as here, the court acquires jurisdiction because of the federal question raised by the bill of complaint, the court has jurisdiction to determine all the questions of the case, local as well as federal.

Our first contention is, therefore, that the act in question contemplates the taxation only of intrastate commerce and not of interstate commerce. The statute (Section 176F of the 1941 Supplement to the General Statutes) defines the tax payable by the corporation as "a tax or excise upon its franchise for the privilege of carrying on or doing business *within the state* * * *". In setting up a method of allocation, the Statute (Section 177F of the 1941 Supplement to the General Statutes) says, "If the trade or business of the taxpayer shall be carried on partly without the state, the business tax shall be imposed on a base which reasonably represents the proportion of the trade or business carried on *within the state*." By way of confirmation see *Underwood v. Chamberlain*, 94 Conn. 47 at page 55 where the court in construing a similar statute which preceded the present statute said:

"It is not an income tax, as such, because it is assessed only if and when the corporation does business within the State, and in the case of domestic corporations doing business in this and other States there is no attempt to assert personal jurisdiction for the purpose of taxing their entire income. Foreign and

¹R. R. Commission v. Pacific Gas & Electric Co., 302 U. S. 338, 82 L. ed. 319.

domestic corporations are treated alike, and the entire income is not taxed unless the entire business of the corporation is done within the State. It is apparent, therefore, that the basis of the tax is not jurisdiction over the property or over the person of the corporation, but jurisdiction over its business; and that it is a tax in the nature of an excise tax levied against domestic and foreign corporations alike, for the privilege of doing business in a corporate capacity within this State."

But unlike the Underwood Typewriter Company, whose business is both intrastate and interstate (the manufacturing being carried on in Connecticut and the sales and service all over the world), the plaintiff's business is entirely interstate. "Interstate commerce is not business done within the State of Missouri. It is business done between two or more states."

The defendant apparently relies on the fact that the plaintiff qualified as a foreign corporation in Connecticut, as shown by Exhibit 1. But that qualification gave the plaintiff no right to operate within this state. It imposed obligations rather than conferring rights. It subjected the plaintiff to the jurisdiction of Connecticut courts and was done to protect the plaintiff's landlord.⁷⁵ A foreign carrier to engage in intrastate business in Connecticut, must not only qualify with the Secretary of State but also with the Public Utilities Commission. In order to operate its trucks in intrastate commerce within the state of Connecticut, the plaintiff would have been compelled to obtain a certificate of public convenience and necessity from the State Public Utilities Commission in accordance with Section 577C of the Cumulative Supplement to the General Statutes (1935)

⁷⁵ Pacific Express Co. v. Seibert, 44 Fed. 310, 316, affirmed 142 U. S. 339.

⁷⁶ See P. 11 Findings of Fact, T. 102.

and with Section 499E of the 1939 Supplement to the General Statutes. No such authority has been sought or granted as we have seen from Exhibits 3 and 4, and as the District Court found.⁷⁶ The plaintiff is therefore not carrying on business "within the state" nor has it the right so to do.

It has been held that the fact that a foreign corporation engaged exclusively in interstate commerce had received from a state a local license to do business in the state, that such license did not subject the corporation to an excise tax.⁷⁷

Still another consideration indicates that the legislative intent was to tax only intrastate commerce and not to tax interstate commerce. It is clearly within the power of the legislature to tax intrastate commerce but its power to tax interstate commerce encounters constitutional questions. That construction which will avoid the constitutional question is to be preferred.⁷⁸

We contend, therefore, that the plaintiff is not carrying on nor has it the right to carry on, its business "within the state". The statute has no application to it. The plaintiff is consequently entitled to the injunction granted by the District Court without regard to the constitutionality of the statute.

⁷⁶Finding P. 12, T. 102.

⁷⁷Ozark Pipe Line Corporation v. Monier et al, 266 U. S. 555, 69 L. ed. 439.

⁷⁸Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. ed. 1143.

POINT 5.

AS CONSTRUED BY THE DEFENDANT THE STATUTE VIOLATES THE DUE PROCESS REQUIREMENTS OF BOTH FEDERAL AND STATE CONSTITUTIONS.

The plaintiff owns no trucks except, as it may be said, for a few pick-up trucks which are registered in its name.⁷⁹ It obtains the trucks needed in its business from owners, by contract. Obviously payments made to such owners by the plaintiff are its greatest single item of expense. The accountant, Mr. Arnold,⁸⁰ testified that this item of purchased transportation (as it is called under Interstate Commerce Commission accounting practice), amounts to approximately 60% of the total expense of Spector Motor Service. The statute does not allow "rent" as a deduction. The defendant construes this item of purchased transportation to be "rent". Certainly under these circumstances the defendant's refusal to allow this large operating expense to be deducted makes this assessment no longer a tax on net income but approaches a tax on gross income from interstate commerce. Such taxation, standing alone, has been repeatedly and recently condemned by this Court.⁸¹

Exhibit 15, as explained by Mr. Arnold,⁸² shows the essential unfairness of the tax as computed by the defendant. If all the other states through which the plaintiff operates imposed a similar tax, a total tax of \$5,339.76 would have been payable out of a net income of \$111.39 for the last seven months of 1938; out of a net income of \$46,064.34

⁷⁹Witness Fisher, T. 25, 26.

⁸⁰Witness Arnold, T. 61, 62.

⁸¹Gwin v. Henneford, 305 U. S. 434, 83 L. ed. 272, and cases cited.

⁸²Witness Arnold, T. 53-56.

for the year 1939 the tax payable would be \$15,442.91 and out of net income of \$10,505.86 for the year 1940 the tax would be \$20,495.86. The net income above mentioned is net income for federal income tax purposes. If such a tax were upheld, its burden on interstate commerce is at once apparent. The demands made by the state do not represent all that can be demanded if the tax is approved. What one state can do all can do. Thus a local business would be affected but little, whereas interstate commerce would feel the full effect of a tax enforced in many states in such a way as to cripple the interstate business. Further in still another particular, Exhibit 15 illustrates perfectly that this type of taxation is a destructive burden on interstate commerce in that it appears from that exhibit that the tax increases proportionately with the gross income but has no relation to the net income. In 1940 with a gross income of \$1,723,510.65 and a net of \$10,505.86 the tax is \$20,495.86. In 1939 with a gross income of \$1,202,210.35 and a net of \$46,064.34 the tax is \$15,442.91, and in 1938 (seven months) with a gross income of \$432,087.39 and a net of \$111.39 the tax is \$5,339.76.

For these reasons the assessment is unfair and inequitable and a violation of due process.

It is significant that without legislative sanction, the state tax department has adopted as a rule of thumb, a policy of allowing 60% of the cost of purchased transportation as an operating expense and disallowing the remaining 40%.⁸³ Obviously it was felt by the department that the cost of purchased transportation was not rent and that some compromise should be adopted. It appears from the testimony of Mr. Steege, Director of the Corporation Division of the State Tax Department,⁸⁴ that the department on

⁸³Findings P. 19, T. 103.

⁸⁴Witness Steege, T. 75-80.

the basis of experience of contract carriers estimated that of the cost of hiring trucks 60% could fairly be considered as an operating expense and 40% representing the value of the use of the vehicle. But the payments here made are not solely for the "use of the vehicle," but represent the cost of operating the vehicle. If reasonable with respect to contract carriers, which is improbable, it is not fair in the present case and the District Court so found.⁸⁵ As Exhibit 16 shows, every cent paid by the plaintiff to its chief lessor, Wallace Transport Co., is used by the company for operating expenses. Exhibit 16 breaks down the operating expenses of Wallace, so that it is obvious that none of the revenue received by Wallace is in reality "rent". If Spector owned the trucks, every penny now paid to Wallace would be used by Spector to operate those trucks. So that the 60-40 allocation adopted by the department is not equitable so far as this plaintiff is concerned. If taxable at all, it is entitled to a deduction of one hundred percent of the cost of purchased transportation.

Moreover, as pointed out by Mr. Fisher,⁸⁶ an allocation suitable for contract carriers or short-haul carriers, is not fair to long-haul carriers like the plaintiff. Yet it was admitted by Mr. Steege that his figures come from contract carriers⁸⁷ and this is confirmed by Mr. Fisher.⁸⁸

Accordingly there is ample evidence to support the District Court's finding that the rule of thumb, applied by the defendant in this case, was not based on any analysis of the plaintiff's records⁸⁹ but was based on the experience of

⁸⁵Findings, P. 21, T. 103.

⁸⁶Witness Fisher, T. 80-84.

⁸⁷Witness Steege, T. 76-78.

⁸⁸Witness Fisher, T. 81.

⁸⁹Findings, P. 20, T. 103.

other carriers whose method of operations varied so from the plaintiff's as to make no fair comparison between them possible.⁹⁰ It follows that the action of the defendant in allowing a deduction of only 60% of the cost of purchased transportation cannot stand, in the face of the showing made by the plaintiff.

For all these reasons we submit the assessments are unfair and discriminatory and a violation of due process.

⁹⁰Findings, P. 21, T. 103.

POINT 6.

THE ASSESSMENTS ARE VOID BECAUSE MADE BY THE DEFENDANT, AN OFFICER OF THE EXECUTIVE DEPARTMENT OF THE STATE GOVERNMENT ACTING IN A LEGISLATIVE CAPACITY.

Article Second of the Constitution of the State of Connecticut provides: "the powers of government shall be divided into three distinct departments and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

As interpreted by the Supreme Court of Connecticut, this provision is a definite check on the delegation of legislative power to an officer of the executive branch of the government. Thus in *State v. Stoddard*,⁹¹ where a legislative delegation of power to the milk administrator was held invalid, the court laid down this principle at page 628:

"A legislature, in creating a law complete in itself and designed to accomplish a particular purpose, may expressly authorize an administrative agency to fill up the details by prescribing rules and regulations for the operation and enforcement of the law. In order to render admissible such delegation of legislative power,

⁹¹*State v. Stoddard*, 126 Conn. 623, 13 Atl. 2nd 586.

however, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 426, 55 Sup. Ct. 241, and note, 79 L. ed. 474 et seq.; *Hampton & Co. v. United States*, 276 U. S. 394, 405, 409, 48 Sup. Ct. 348; *Wichita R. R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 59, 43 Sup. Ct. 52; *Connecticut Co. v. Norwalk*, 89 Conn. 528, 531, 94 Atl. 992; 11 Am. Jur. 956. If the legislature fails to prescribe with reasonable clarity the limits of the power delegated or if those limits are too broad, its attempt to delegate is a nullity. *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 530, 55 Sup. Ct. 837; *Holgate Bros. Co. v. Bashore*, 331 Pa. St. 255, 262, 200 Atl. 672, 117 A. 2d R. 639, 644, 645; *Van Winkle v. Fred Meyer, Inc.*, 15 Ore. 455, 466, 49 Pac. (2d) 1140; *Jersey Maid Milk Products Co., Inc. v. Brock*, 13 Cal. (2d) 620, 642, 91 Pac. (2d) 577, 589."

Measured by this standard we submit that the present statute is unconstitutional as a violation of the state constitution^{21a} and as a violation of the federal constitution because of a lack of due process. The statute (section 177F formerly 420C of the Supplement to the General Statutes and 356E of the 1939 Supplement sets up the method of allocating net income. After providing for an allocation of such forms of income as interest, dividends, royalties and gains, the statute provides: "The remainder of the net income of the taxpayer shall be allocated and apportioned as follows: (a) Such income when received from business other than the manufacture, sale or use of tangible per-

^{21a} *Connecticut Baptist Convention v. McCarthy*, 128 Conn. 701, 25 Atl. 2nd 656.

sonal or real property shall be specifically allocated within and without the state under rules and regulations of the tax commissioner."

A common carrier, like a restaurant owner, the dentist or the plumber, sells its services. The use of personal property is merely incidental. "Service is the predominant feature of the transaction."⁹²

Therefore, since the plaintiff's business was selling its services—an intangible thing—it was not engaged in the manufacture, sale or use of tangible personal or real property. The allocation of its net income from the sale of those services was therefore determined by subsection (a) above, which left it to the absolute and uncontrolled discretion of the defendant to fix. There is in the statute no standard or principle by which the defendant might be guided. In brief, he was handed supreme legislative power in violation of the constitutional provisions cited.

It is, of course, no answer that the present defendant used his best judgment in making the allocation. The point is that with no standard set up by the legislature, it is open to the tax commissioner, or to a future tax commissioner, to make any allocation he pleases. It is the system which we attack as being unconstitutional. The system being unconstitutional, its product is likewise unconstitutional.

The Computations Were Made On An Inaccurate Base.

In this section we do not contend that the computations are arithmetically inaccurate. Our contention is more fundamental.

As we contended, the plaintiff's income does not come from the manufacture or sale of real or personal property.

⁹²Lynch v. Hotel Bond Co., 117 Conn. 128, 131.

Ace High Dresses, Inc. v. J. C. Trucking Company, Inc., 122 Conn. 578, 581.

It comes from the sale of an intangible thing "service" in which personal property plays a relatively minor role. Therefore, the allocation of its income should have been under subsection (a) of the statute, which, as we have just argued, grants to the commissioner unconstitutional power.

But in fact, as Mr. De Cicco, senior examiner of the Tax Department, testified,⁹³ the formula actually used was not that set out in subsection (a) but that used in subsection (b) which sets up a mean of three complicated fractions as the proper formula for allocation. Subsection (b) however, by its terms applies only to those corporations whose income is "derived from the manufacture, sale or use of tangible personal or real property." Since we have seen that the plaintiff's income is not derived from such a source, it follows that the formula of subsection (b) is not applicable and that the defendant was in error in using it.

The Results Are Contrary To State Policy.

As disclosed by the provisions of Connecticut law applicable to railroads, etc. (set forth in the appendix), the policy of the state is to apply its tax laws, dealing with transportation, only to business actually conducted within the state and then, such taxes on gross revenue are in lieu taxes. As applied, the statute here in issue is not confined to revenue earned in the state, nor is the statute an in lieu tax.

For those reasons we claim the assessments to be invalid.

⁹³Witness De Cicco, T. 72-75.

POINT 7.

PENALTIES AND INTEREST SHOULD NOT BE ALLOWED.

As pointed out in the opinion of the Circuit Court⁹⁴ the state claims penalties and interest. In view of the questions involved and good faith litigation, such penalties and interest should not be recovered,⁹⁵ even if a tax liability is finally determined.

CONCLUSION.

The Court of Appeals frankly stated that the decision of this Court in the *Alpha Portland Cement case*⁹⁶ "foreclosed all further discussion". That observation is particularly important in two respects. Factually, that case dealt with a statute which was substantially identical with the Connecticut statute here assailed. Legally, the Court of Appeals has pursued an unusual course in disregarding the existing law, as laid down by this Court, and in undertaking to foreclose future decisions.

⁹⁴Opinion C. C. A. T. 113.

⁹⁵Uebersee Finanz Korporation, etc., v. Rosep, 83 Fed. (2d) 225.

Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714.

Chesapeake & Ohio Ry. Co. v. Conley, 230 U. S. 513, 57 L. ed. 1597.

Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507.

Natural Gas Pipe Line v. Slattery, 302 U. S. 300, 82 L. ed. 276.

Oklahoma Operating Co. v. Love, 252 U. S. 331, 64 L. ed. 596.

St. L. Iron M. R. Co. v. Williams, 251 U. S. 63, 64 L. ed. 139.

Wadley So. R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405.

⁹⁶Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 69 L. ed. 916.

We respectfully suggest that the learned Court of Appeals became intrigued with what it conceived to be a trend in tax philosophy to the obscuration of the facts in this case.

We have pursued the dissenting opinions in the numerous cases cited by the Circuit Court of Appeals. The most that we can glean, from the dissenting opinions, is the readily understandable proposition that Congress should indicate the extent, if any, which it is willing to permit the cost of engaging in interstate commerce to be increased by state taxation.

The case at bar presents the distinction between taxation which increases the cost of interstate commerce and to that extent burdens interstate commerce, and a tax, which, if applied, by all of the states would, to a mathematical certainty destroy interstate commerce.

This Court (nor any of the dissenting opinions) have ever gone beyond holding that one who challenges a state tax as being a destructive burden on interstate commerce, assumes the duty of demonstrating the fact.

There have been cases where the charge of destructive burdens was made but not proven and nothing in the facts of such cases necessarily lead to the conclusion that the tax might be destructive. Here, we have, to the best of our ability, undertaken to demonstrate, from factual matter of record, that the tax is destructive as distinguished from burdensome. In aid of our illustrations of the point, we have referred to certain statistical material prepared by the Interstate Commerce Commission.

The Court of Appeals bases its opinion on the weight to be given practical considerations in dealing with tax matters. However, we respectfully suggest that the Honorable Court overlooked the fact that this Court, in every case, has dealt with the facts before it, and the opinions of this Court cannot be disassociated from the facts in the cases.

We have tried to spell out the proposition that the "commerce" clause has been implemented by many expressions from Congress with respect to the freedom of interstate commerce from, at least, destructive burdens, if not from all burdens. The opinions of this Court and the dissenting opinions of the Honorable Justices have, as we understand them, done no more than to carefully consider the difficulties which are confronted by this Court in distinguishing between mere burdens and destructive burdens. There is nothing in either the majority or dissenting opinions to indicate that this Court would ever have any hesitation in striking down a destructive burden once the tax was identified and established as such.

If we have made our case, by establishing the destructive nature of the tax, then we have met the issues which have been raised by the opinions of this Court. We think we have presented such a case, and met the requirements in connection therewith.

We have stated that the tax has the capacity to destroy interstate commerce. In closing, we undertake a further analysis of that proposition. In presenting the summary, we have in mind both the allowances or concessions, presently made by Connecticut (by way of grace), and the full force of the tax in the light of the legal principles which are involved.

Any tax scheme involving defined income, which converts an actual deficit into a profit, is unreasonable, regardless of the fact that the "allowances" lessen the magnitude of the burden. Once the theory of the tax scheme clears the Constitutional issues, the removal of administrative grace and the correction of errors in assessments will inevitably follow, and interstate commerce will receive the full force of the tax policy.

As presently applied, Connecticut allows, administratively, a deduction of 60% of the payments for purchased

transportation, which the tax administrator calls "rent". However, as we pointed out, this appears to have come about because the tax administrator was under the impression that drivers' wages were involved in the "rent" paid to the Wallace Company. The facts are that no drivers' wages were included in such "rent", and, therefore, it is to be expected that, for the future, no deductible allowance will be made. That "correction" alone would more than double the tax.

Another administrative concession, presently allowed, is that the tax is only computed on the basis of interstate commerce originated, or, more accurately, delivered to the carrier, in Connecticut. If interstate commerce may be taxed on account of place of delivery to a common carrier, there appears to be no presently recognized legal ground for contending that interstate commerce may not also be taxed on the basis of the final portion of the journey. The Connecticut statute makes no distinction, and, if one-way traffic may be taxed, it follows that two-way traffic will be taxed.

As presently applied by Connecticut, alone, the tax exceeded plaintiff's income for the years 1939 and 1942. For 1938 (7 months) the plaintiff's net income was \$111.39⁹⁷ and the tax was \$698.94.⁹⁸ In 1942, plaintiff had an actual deficit of \$31,842⁹⁹ but in that year the carrier had an expense of \$1,045,221 for purchased transportation, and 46% of that amount would be disallowed by Connecticut, under its present practice, as an expense, with a resulting fictitious defined income of about \$400,000, subject to allocation and taxation by Connecticut.

⁹⁷See note 5.

⁹⁸Exhibit 18.

⁹⁹See note 9.

If the other states, through which plaintiff operates, levied a tax, as applied by Connecticut, the tax would exceed plaintiff's income for 1938, 1940 and 1942. If the other states levied the same 2% tax on all of the "defined income", the tax for 1938 would have been \$5,339.76 for 7 months, as against an actual net income of \$111.39 for 7 months.¹⁰⁰ On the same basis, the tax for 1940 would have been \$20,495.86 as against an actual net income of \$10,505.86, and would have resulted in a deficit for the year. The amount of tax for 1942 is not shown of record, but the plaintiff operated with an actual deficit of \$31,842 for that year.¹⁰¹ In that year, plaintiff had expenses of \$1,045,221 for purchased transportation, of which 40% would be disallowed and thereby producing a defined income of at least \$400,000, subject to tax. Application of the tax by all states could only serve to increase the deficit.

Withdrawal by Connecticut and other states of the 60% "allowances" for expense in connection with purchased transportation, would have the effect of increasing the tax by about 150%.

Inasmuch as the "allowance" appears to have been made under a misunderstanding of the facts,¹⁰² it is logical to anticipate withdrawal. Based on the withdrawal of the 60% expenses allowance, on purchased transportation, the defined income would be increased by that amount. In 1940, plaintiff paid out \$991,122 for purchased transportation. Of this amount 60% has been allowed as an expense and 40% disallowed.

Disallowance of the presently allowed 60% of the cost of purchased transportation, would increase the defined

¹⁰⁰Witness Arnold, T. 53-56 and Exhibit 15.

¹⁰¹See note⁹⁹.

¹⁰²Witness Arnold, T. 62, 63.

income by about \$600,000 upon which a 2% tax would be exacted. That would increase the tax from \$20,495.86 to about \$32,000 for all states, when the actual net earnings were only \$10,505.86.¹⁰³

It should be noted that Connecticut allocates to itself from 30% to 50% of plaintiff's gross business,¹⁰⁴ whereas Connecticut represents only 4.23% of plaintiff's mileage.¹⁰⁵ Clearly if other states did likewise, the results would again pyramid the tax in every state.

In every case that has come to our attention, involving allocations, between states, of taxation of transportation revenue or facilities, some form of mileage allocation has been used.¹⁰⁶ Certainly the mileage basis approaches the only known means of an equitable allocation of transportation revenue, if the tax be legal otherwise. Traffic originates and terminates in every state in which applicant operates with the exception of Ohio, which is a "bridge" state only,¹⁰⁷ however line-haul revenue is necessarily earned in that state.

¹⁰³ Witness Arnold, T. 53-56, Exhibit 15.

¹⁰⁴ Exhibit 17.

¹⁰⁵ Exhibit 18.

¹⁰⁶ *Western Union T. Co. v. Massachusetts*, 125 U. S. 530, 31 L. ed. 790.

Pullman P. C. Co. v. Pa., 141 U. S. 18, 35 L. ed. 613.

Pittsburgh etc. Ry. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031.

Cleveland etc. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041.

Postal T. & C. Co. v. Adams, 155 U. S. 688, 39 L. ed. 311.

Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229.

Fargo v. Hart, 193 U. S. 490, 48 L. ed. 791.

Pullman Co. v. Richardson, 261 U. S. 330, 67 L. ed. 692.

Atlantic Coast L. R. Co. v. Doughton, 262 U. S. 413, 67 L. ed. 1051.

¹⁰⁷ Exhibits 5 and 6.

We beg the indulgence of the Court that we may make an observation with respect to the general subject of constitutional tax philosophy. We do not think that the purpose of the commerce clause was limited to that of an enabling act for Congress. As we view the matter, the colonies had enough experience with burdens on interstate commerce and therefore demanded constitutional protection in and of itself.

The influences which prevail to burden interstate commerce in some State Legislatures, do not, at that point, exhaust their influence.

We concede the merit in the observation of the dissenting Justices in *McCarroll v. Dixie Greyhound Lines*¹⁰⁸ where it was said:

"Unconfined by the narrow scope of judicial proceedings Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union."

However, appreciation of mundane practicalities moves us to the sincere assertion that permanent tenure of office was a safeguard which the Constitution provided this Court¹⁰⁹ and did not provide for Congress.

¹⁰⁸ *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 84 L. ed. 683.

¹⁰⁹ Constitution, Art. III, Section 1.

WHEREFORE, It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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APPENIX

Connecticut General Statutes

The Connecticut Corporation Business Tax, Act of 1935.

Section 418c, 1935 Supplement to the General Statutes:

Sec. 418c. Imposition of tax. Every mutual savings bank, savings and loan association and building and loan association doing business in this State, and every other corporation or association carrying on business in this state which is required to report to the collector of internal revenue for the district in which such corporation or association has its principal place of business for the purpose of assessment, collection and payment of an income tax, except (1) insurance companies, (2) companies principally engaged in the transportation and communication business and subject to the gross earnings taxes under chapters 70, 71 and 72, (3) companies principally engaged in manufacturing, selling or distributing gas, electricity or water and subject to the gross earnings tax imposed under chapter 73 and (4) companies all of whose properties in this state are operated by companies subject to taxation under chapters 70, 71, 72 and 73, shall pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state, such tax to be measured by the entire net income as herein defined received by such corporation or association from business transacted within the state during the income year and to be assessed at the rate of two per cent; provided in no case shall the tax be less than minimum tax as computed under section 421c and provided, when any company taxable under chapter 71 shall engage in any business in this state other than the carrying of passengers for hire in common carrier motor vehicles, such company shall be subject to a tax of two per cent measured by that portion of its total net income derived from such business but shall not be subject to the minimum tax computed under section 421c. Notwithstanding any other provisions of this chapter, any mutual savings bank owning, at the end of the income year, real estate acquired for debt having an assessed valuation of ten per cent

or more of its total assets shall, during the calendar years 1936 and 1937, be subject to the lesser of (1) the tax imposed by this chapter and (2) the tax imposed by chapter 68 as amended by section 355b of the 1933 supplement. ⁽¹⁾

Section 419c, 1935 Supplement to the General Statutes:

Sec. 419c. Deductions from gross income. In arriving at net income as defined in section 417c whether or not the taxpayer is taxable under the Federal Corporation net income tax, there shall be deducted from gross income all items deductible under the federal corporation net income tax law effective and in force on the last day of the income year, except (1) federal taxes on income or profits, losses of prior years, interest received from federal, state and local government securities and specific exemptions, if any such deductions shall be allowed by the federal government and (2) interest and rent paid during the income year.

Section 420c, 1935 Supplement to the General Statutes:

Sec. 420c. Allocation of net income. If the trade or business of the taxpayer shall be carried on partly without the state, the business tax shall be imposed on a base which reasonably represents the proportion of the trade or business carried on within the state. The allocation of the base of the tax measured by net income shall be made on the following basis: (1) Interest, dividends, royalties and gains from sales of intangible assets, less related expenses, when received by a company having its principal place of business within the state, shall be allocated to the state and, when received by a company having its principal place of business without the state, shall be allocated without the state; provided, when it can be clearly established that such income is received in connection with business within the state, such income shall be allocated to the state without regard to the location of the principal place

⁽¹⁾ Effective July 1, 1937, the legislature amended Sec. 418c to apply to every corporation not merely carrying on, but also "having the right to carry on," business in this state. Connecticut General Statutes, Supplement 1939, Section 354e. This amendment was cited by the Circuit Court of Appeals as shown by the opinion at T. 112.

of business of the taxpayer; and a similar rule shall apply to such income received in connection with business without the state; (2) gains from sales or rentals of tangible capital assets held, owned or used in connection with the trade or business of the taxpayer but not for sale or for rent in the regular course of business shall be allocated to the state if the property sold or rented be situated in the state prior to the sale or during the rental thereof, otherwise such gains shall be allocated outside the state; (3) net income of the above classes having been separately allocated and deducted as above provided, the remainder of the net income of the taxpayer shall be allocated and apportioned as follows: (a) Such income, when derived from business other than the manufacture, sale or use of tangible personal or real property, shall be specifically allocated within and without the state under rules and regulations of the tax commissioner; (b) when derived from the manufacture, sale or use of tangible personal or real property, the portion thereof attributable to business within the state shall be determined by means of an allocation fraction to be computed as the simple arithmetical mean of three fractions. The first of these fractions shall represent that part of the average monthly fair cash value of the total tangible property held and owned by the taxpayer during the income year which is held within the state, without deduction on account of any incumbrance thereon but excluding any property the income of which is separately allocated under the foregoing provisions of this chapter. The second fraction shall represent the part of the total wages, salaries and other compensation to employees paid by the taxpayer during the income year from offices, agencies or places of business within the state, provided all such payments shall be assigned to the office, agency or place of business of the taxpayer at which the employee chiefly works or from which he is sent out or with which he is chiefly connected. The third fraction shall represent the part of the taxpayer's gross receipts from sales or other sources during the income year, excluding any income which is specifically allocated under subdivisions (1) and (2) of this section, which is assignable to offices, agencies or places of

business within the state, provided such receipts shall be assigned to that office, agency or place of business at or from which the transactions giving rise thereto are chiefly negotiated and executed.

Taxation of Railroads

Chap. 70, Section 1302, General Statutes of Connecticut, 1930:

Each corporation operating a steam or electric railroad or street railway and carrying on business for profit in this state, shall pay annually a tax computed upon its gross earnings from all sources from operations in this state; gross earnings being all receipts classified as railway operating revenues by the Interstate Commerce Commission in the classification of accounts prescribed by said Commission. No deduction shall be made from such gross earnings for any commission, rebate or other payment, except a refund resulting from an error or overcharge.

Chap. 70, Sec. 1307, General Statutes, 1930:

The tax provided for in this chapter upon the gross earnings of each corporation included in section 1302 shall be in lieu of all other taxes in this state for the year ended the thirty-first day of December of the year for which such statement is required to be made on its rights, franchises, funded and floating debt and property in this state, and on the property of each corporation, which property is operated in this state by any such corporation so liable to such tax upon gross earnings; but the real estate in this state owned by such corporation, or by a corporation whose property is operated by it, when not used exclusively for railroad purposes, shall be assessed and taxed where it is located. . . .

Chap. 70, Sec. 44Se, 1935, Cumulative Supplement, amending Section 1304, General Statutes:

Such tax shall be based on the amount of gross earnings from all sources from operations in this state, as follows: (1) In case of a corporation operating a

railroad or railway which is entirely within the limits of this state, the amount of gross earnings from all sources from operations; (2) in case of a corporation operating a railroad or railway when only a part of such railroad or railway lies in this state, such portion of the amount of gross earnings from all sources from operations as is represented by the ratio of the number of miles of tracks, including yard tracks, sidings, branches and spurs, operated in this state during the year ended said thirty-first day of December, to the number of miles of such tracks, including yard tracks, sidings, branches and spurs, operated by it during such year. The net railway operating income for the purpose of computing the rate of tax shall constitute: (1) In the case of a corporation operating a steam or electric railroad which is entirely within the limits of this state, the entire net railway operating income; (2) in the case of a corporation operating a steam or electric railroad, only a part of which railroad is in this state, such portion of the net railway operating income as is represented by the ratio of the number of miles of tracks, including yard tracks, sidings, branches and spurs, operated in this state during the year ended said December thirty-first, to the number of miles of such tracks, including yard tracks, sidings, branches and spurs, operated by it during such year. The rate of tax on gross earnings of street railways shall be three per cent; the rate of tax on gross earnings of steam or electric railroads, other than street railways shall be fixed as follows: (a) When there shall be no net railway operating income, or the net railway operating income shall not exceed eight per cent of the gross earnings, two per cent of the gross earnings; (b) when the net railway operating income shall exceed eight per cent of the gross earnings, but shall not exceed ten per cent, two and one-quarter per cent; (c) when the net railway operating income shall exceed ten per cent of the gross earnings, but shall not exceed twelve per cent, two and one-half per cent; (d) when the net railway operating income shall exceed twelve per cent of the gross earnings, but shall not exceed fourteen per cent, two and three-quarters per cent; (e) when the net railway operating income shall exceed fourteen per cent of the gross earnings, but

shall not exceed sixteen per cent, three per cent; (f) when the net railway operating income shall exceed sixteen per cent of the gross earnings, but shall not exceed eighteen per cent, three and one-quarter per cent; (g) when the net railway operating income shall exceed eighteen per cent of the gross earnings, three and one-half per cent. The amount of taxes paid during the year ended said thirty-first day of December, in any town in this state, on the real estate not used exclusively in the business of such corporation, or of any corporation all of whose property is operated by such corporation, shall be deducted from the amount of the tax upon such gross earnings.

Taxation of Bus Companies

Chap. 71, Section 452, of the 1935 Cumulative Supplement, amending Section 1312, General Statutes, provides that

motor bus companies operating partly in Connecticut and partly elsewhere, shall pay a tax of 3 per cent upon that portion of their gross receipts which the Connecticut mileage bears to total mileage. This is also an in-lieu tax (Sec. 454c; 1935 Cum. Supp. amending S. 1314, General Statutes.)

SPECTOR MOTOR SERVICE, INC.

SCHEDULE 5200

From Annual Report Filed With
The Interstate Commerce Commission.

	1939	1940	1941	1942
Public Utility Taxes and Licenses	\$ 1,163.95	\$ 780.44	\$ 1,730.04	\$ — —
Other Licenses	16.00	—	466.90	568.00
Corporation Taxes	124.25	96.50	239.50	139.65
Personal Property Tax	4.18 ⁰⁰	10.46	49.33	388.47
Social Security Tax	11,960.00	16,401.44	25,139.34	24,716.21
Federal and State Capital-Stock and Stock-Transfer Tax	500.00	877.15	1,875.00	625.00
Federal Excise Taxes	—	103.21	877.47	2,216.05
Other Taxes	40.00	—	—	12.47
Grand Total	13,808.37	18,269.20	30,377.58	28,665.85

Note: These taxes are exclusive of the taxes paid by the Wallace Transportation Co. from whom appellant secures most of its vehicles.

